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A TREATISE  
ON THE  
LAW OF CARRIERS  

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VOLUME THREE



A TREATISE  
ON THE  
LAW OF CARRIERS

AS ADMINISTERED BY THE COURTS OF THE UNITED STATES,  
CANADA AND ENGLAND, COVERING THE PRINCIPLES AND  
RULES APPLICABLE TO CARRIERS OF GOODS, PASSENGERS,  
LIVE STOCK, COMMON CARRIERS, CONNECTING CAR-  
RIERS, AND INTERSTATE AND INTERNATIONAL  
TRANSPORTATION BY LAND AND WATER,  
AND THE METHODS AND PROCEDURE FOR  
THEIR ENFORCEMENT, FURNISHING A  
PRACTICAL GUIDE TO LITIGANTS IN  
THE JURISDICTIONS NAMED, AND  
INCLUDING THE TEXT OF

THE ACT TO REGULATE COMMERCE  
AS AMENDED

AND ALL ACTS SUPPLEMENTARY THERETO  
REVISED TO JANUARY 1, 1914

By DEWITT C. MOORE

Of the Johnstown, New York, Bar; Author of "The Law of Fraudulent Conveyances."

SECOND EDITION

IN THREE VOLUMES

VOLUME III



ALBANY N. Y.  
MATTHEW BENDER & COMPANY  
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# THE LAW OF CARRIERS.

## VOLUME III.

### CHAPTER XXVI.

#### LIMITATION OF CARRIER'S LIABILITY.

- SECTION** 1. Limitation of carrier's liability generally.  
2. Essentials of contract limiting liability for negligence.  
3. Limitation of liability for negligence.  
4. The New York rule.  
5. The English rule.  
6. Limitation of liability for negligence as to particular classes of passengers.

#### § 1. Limitation of carrier's liability generally.

Notwithstanding some of the earlier cases held that a common carrier could not in any way limit or restrict its common law liabilities,<sup>1</sup> it is now generally maintained that a common carrier, whether a railroad or other carrier or whether a carrier by land or sea, may by express contract or special agreement, limit its liability for injuries not arising from the negligence of itself or its servants, when such exemption is just and reasonable.<sup>2</sup> But it cannot do

1. *Gould v. Hill*, 2 Hill (N. Y.), 625; *Cole v. Goodwin*, 19 Wend. (N. Y.) 257, 32 Am. Dec. 470; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Thomas v. Boston, etc., R. Corp.*, 10 Mete. (Mass.) 479, 43 Am. Dec. 444; *Roll v. Raguet*, 4 Ohio, 400, 22 Am. Dec. 759; *Jones v. Voorhees*, 10 Ohio, 145.

2. *U. S.*—*New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 322; *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 658; *Liverpool, etc., Steam. Co. v. Phoenix Ins. Co.*, 129 U. S. 397.

*N. Y.*—*Kenney v. New York Cent., etc., R. Co.*, 125 N. Y. 422; *Ulrich v. New York Cent., etc., R. Co.*, 108 N. Y. 80, 2 Am. St. Rep. 369; *Brewer v. New York, etc., R. Co.*, 124 N. Y. 59, 21 Am. St. Rep. 647; *Blair v. Erie R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Elliott v. New York Cent., etc., R. Co.*, 33 St. Rep. (N. Y.) 861; *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Stinson v. New York Cent. R. Co.*, 32 N. Y. 333, 88 Am. Dec. 332; *Smith v. New York Cent. R. Co.*, 24 N. Y. 222; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; *Wells v. New York Cent. R. Co.*, 24 N. Y. 181; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, 82 Am. Rep. 282; *Seybolt v. New York,*

so by mere notice, although brought to the knowledge of the passen-

etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75; Coppock v. Long Island R. Co., 89 Hun (N. Y.), 186; Boswell v. Hudson River R. Co., 5 Bosw. (N. Y.) 699.

*Ala.*—Mobile, etc., R. Co. v. Hopkins, 41 Ala. 489, 94 Am. Dec. 607; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49.

*Conn.*—Griswold v. New York, etc., R. Co., 53 Conn. 371, 55 Am. Rep. 115; Lawrence v. New York, etc., R. Co., 36 Conn. 63.

*Del.*—Flinn v. Philadelphia, etc., R. Co., 1 Houst. (Del.) 469.

*D. C.*—Galt v. Adams Express Co., McArthur & M. (D. C.) 138.

*Ill.*—Toledo, etc., R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Arnold v. Illinois Cent. R. Co., 83 Ill. 273, 25 Am. Rep. 386; Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760.

*Ind.*—Rosenfeld v. Peoria, etc., R. Co., 103 Ind. 121, 53 Am. Rep. 500; Ohio, etc., R. Co. v. Nickless, 71 Ind. 271; Louisville, etc., R. Co. v. Nicholas, 4 Ind. App. 122; Ohio, etc., R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Louisville, etc., R. Co. v. Taylor, 126 Ind. 126; Adams Express Co. v. Reagan, 29 Ind. 21, 92 Am. Dec. 332; Thayer v. St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Indiana Cent. R. Co. v. Mundy, 21 Ind. 48, 83 Am. Dec. 339.

*Iowa.*—Solan v. Chicago, etc., R. Co. (Iowa), 63 N. W. 692; Rose v. Des Moines Valley R. Co., 39 Iowa, 246. See also, Hart v. Chicago, etc., R. Co., 69 Iowa, 485.

*Kan.*—Kansas City, etc., R. Co. v.

Simpson 30 Kan. 645, 46 Am. Rep. 104.

*La.*—Higgins v. New Orleans, etc., R. Co., 28 La. Ann. 133.

*Me.*—Rogers v. Kennebec Steamboat Co., 86 Me. 261.

*Md.*—Baltimore, etc., R. Co. v. Brady, 32 Md. 333.

*Mass.*—Hosmer v. Old Colony R. Co., 156 Mass. 506; Quimby v. Boston, etc., R. Co., 150 Mass. 365; Bates v. Old Colony R. Co., 147 Mass. 255; Pemberton Co. v. New York Cent. R. Co., 104 Mass. 144; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

*Minn.*—Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360; Christenson v. American Express Co., 15 Minn. 270, 2 Am. Rep. 122.

*Miss.*—Southern Express Co. v. Moon, 39 Miss. 822.

*Mo.*—Jones v. St. Louis, etc., R. Co., 125 Mo. 666; Tibby v. Missouri Pac. R. Co., 82 Mo. 292; Bryan v. Missouri Pac. R. Co., 32 Mo. App. 228; Carroll v. Missouri Pac. R. Co., 88 Mo. 239, 57 Am. Rep. 382.

*N. H.*—Merrill v. American Express Co., 62 N. H. 514; Rand v. Merchants Dispatch Transp. Co., 59 N. H. 363; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

*N. J.*—Kinney v. Central R. Co., 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 513, 3 Am. Rep. 265.

*Ohio.*—Knowlton v. Erie R. Co., 19 Ohio St. 260, 2 Am. Rep. 395; Cleveland, etc., R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362; Davidson v. Graham, 2 Ohio St. 131.

*Pa.*—Camden, etc., R. Co. v. Bausch

ger,<sup>3</sup> unless such notice is expressly assented to, in which case it is

(Pa.), 7 Atl. 731; Buffalo, etc., R. Co. v. O'Hara (Pa.), 9 Am. & Eng. R. Cas. 317; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 532; Beckman v. Shouse, 5 Rawle (Pa.), 179, 28 Am. Dec. 653.

*S. C.*—Zemp v. Wilmington, etc., R. Co., 9 Rich. L. (S. C.) 84.

*S. Dak.*—Meuer v. Chicago, etc., R. Co., 5 S. Dak. 568.

*Tenn.*—Louisville, etc., R. Co. v. Gilbert. 88 Tenn. 430; Dillard v. Louisville, etc., R. Co., 2 Lea (Tenn.), 292.

*Tex.*—International, etc., R. Co. v. Campbell, 1 Tex. Civ. App. 509; Harris v. Howe, 74 Tex. 534, 15 Am. St. Rep. 862; Missouri Pac. R. Co. v. Ivy, 71 Tex. 409, 10 Am. St. Rep. 758; Gulf, etc., R. Co. v. McGown, 65 Tex. 645; Galveston, etc., R. Co. v. Kinnebrew, 7 Tex. Civ. App. 549.

*Va.*—Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328.

*Wash.*—Muldoon v. Seattle City R. Co., 7 Wash. 528. 38 Am. St. Rep. 748.

*W. Va.*—Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 901.

*Wis.*—Davis v. Chicago, etc., R. Co., 93 Wis. 470; Annas v. Milwaukee, etc., R. Co., 67 Wis. 46, 58 Am. Rep. 848.

*Eng.*—Hall v. Northeastern R. Co., L. R. 10 Q. B. 443; Gallin v. London, etc., R. Co., L. R. 10 Q. B. 212; McCawley v. Furnace R. Co., L. R. 8 Q. B. 57.

The rule is modified as to carriers by water, except as to vessels of

any kind used in rivers or inland navigation, by the United States Revised Statutes. Liverpool, etc., Steam Co. v. Phoenix Ins. Co., 129 U. S. 397; Norwich Co. v. Wright, 13 Wall. (U. S.) 104; Thorp v. Hammond, 12 Wall. (U. S.) 408; Walker v. Western Transp. Co., 3 Wall. (U. S.) 150; Moore v. American Transp. Co., 24 How. (U. S.) 1; Propeller Niagara v. Cordes, 21 How. (U. S.) 26.

*3. U. S.*—The Majestic, 60 Fed. 624; New Jersey Steam Nav. Co. v. Merchants' Bank. 6 How. (U. S.) 383; York Co. v. Illinois Cent. R. Co., 3 Wall. (U. S.) 107; Hopkins v. Westcott, 6 Blatchf. (U. S.) 64.

*N. Y.*—Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Bissell v. New York Cent. R. Co., 25 N. Y. 442; Perkins v. New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282; Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 490, 62 Am. Dec. 125; Rawson v. Pennsylvania R. Co., 2 Abb. Pr. N. S. (N. Y.) 220; Camden, etc., R. Co. v. Belknap, 21 Wend. (N. Y.) 354; Clark v. Faxton, 21 Wend. (N. Y.) 153; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Gould v. Hill, 2 Hill (N. Y.), 624; Limburger v. Westcott, 49 Barb. (N. Y.) 283.

*Ala.*—Alabama, etc., R. Co. v. Little, 71 Ala. 611; Southern Express Co. v. Crook, 44 Ala. 469, 4 Am. Rep. 140.

*Ark.*—St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104.

*Conn.*—Peck v. Weeks, 34 Conn.

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149; *Derwort v. Loomer*, 21 Conn. 245; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398.

*Dak.*—*Hartwell v. Northern Pac. Express Co.*, 5 Dak. 463.

*Del.*—*Flinn v. Philadelphia R. Co.*, 1 Houst. (Del.) 469.

*Ga.*—*Phillips v. Georgia R., etc.*, Co., 93 Ga. 356; *Central R. Co. v. Combs*, 70 Ga. 533, 48 Am. Rep. 582; *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393. Limitation of liability by notice is expressly prohibited by statute.

*Ill.*—*Erie R. Co. v. Willecox*, 84 Ill. 239; *Field v. Chicago, etc., R. Co.*, 71 Ill. 458; *Oppenheim v. United States Exp. Co.*, 69 Ill. 62, 18 Am. Rep. 596; *Adams Express Co. v. Haynes*, 42 Ill. 89.

*Ind.*—*Evansville, etc., R. Co. v. Young*, 28 Ind. 516.

*Iowa.*—See cases cited in last preceding note.

*Kan.*—*Kansas City, etc., R. Co. v. Rodebaugh*, 38 Kan. 45, 5 Am. St. Rep. 715; *Kansas Pac. R. Co. v. Reynolds*, 17 Kan. 251.

*Ky.*—*Louisville, etc., R. Co. v. Brownlee*, 14 Bush (Ky.), 590; *Adams Express Co. v. Noek*, 2 Duv. (Ky.) 562, 87 Am. Dec. 510.

*Me.*—*Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659.

*Md.*—*Barney v. Prentiss*, 4 Har. & J. (Md.) 317, 7 Am. Dec. 670.

*Mass.*—*Lewis v. New York Sleeping Car Co.*, 143 Mass. 267, 58 Am. Rep. 135; *Gott v. Dinsmore*, 111

Mass. 45; *Maroney v. Old Colony etc., R. Co.*, 106 Mass. 153, 8 Am. Rep. 305; *Perry v. Thompson*, 98 Mass. 249; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Judson v. Western R. Corp.*, 6 Allen (Mass.), 486, 83 Am. Dec. 646; *Malone v. Boston, etc., R. Corp.*, 12 Gray (Mass.), 388, 74 Am. Dec. 598.

*Miss.*—*Mobile, etc., R. Co. v. Weiner*, 49 Miss. 725.

*N. H.*—*Moses v. Boston, etc., R. Co.*, 32 N. H. 523, 64 Am. Dec. 381.

*N. C.*—*Smith v. North Carolina R. Co.*, 64 N. C. 235.

*Ohio.*—*Baltimore, etc., R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617; *Jones v. Voorhees*, 10 Ohio, 145; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285.

*Or.*—*Seller v. Steamship Pacific*, 1 Or. 409.

*S. C.*—*Wallingford v. Columbia, etc., R. Co.*, 26 S. C. 258; *Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. C. 353; *Patton v. Magrath*, *Dudley L. (S. C.)* 159, 31 Am. Dec. 552; *Singleton v. Hilliard*, 1 Strobl. L. (S. C.) 203. Limitation by notice prohibited by statute.

*S. Dak.*—*Meuer v. Chicago, etc., R. Co.*, 5 S. Dak. 568. Limitation by notice precluded by statute.

*Vt.*—*Mann v. Birchard*, 40 Vt. 326; *Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247, 62 Am. Dec. 567.

*W. Va.*—*Brown v. Adams Express Co.*, 15 W. Va. 812.

In England restriction of the common law liability of common carriers by mere notice is prohibited by the Railway and Canal Traffic Act.

A contrary rule is maintained in

same rules applicable in case of an express contract.<sup>4</sup> The burden of proof lies on the carrier to show the assent of the passenger, and either an express stipulation by parol or in writing, or an actual adoption of the notice, must be shown to discharge the carrier from the duties which the law has annexed to his employment; assent is not to be implied or inferred.<sup>5</sup> But notices limiting the carrier's liability for baggage to a specified amount, unless its value is disclosed and an additional payment made for the excess over the amount named, have generally been held valid when brought to the knowledge of the owner, whether expressly assented to by him or not, the carrier being held entitled to this protection from fraud on the part of the owners of baggage.<sup>6</sup> A notice, however, printed upon the face of the ticket, unless the passenger's attention was called to it when purchasing, or he had knowledge thereof, is not sufficient; a discovery of the notice by

Pennsylvania, where it is held that the liability of a common carrier may be qualified by express contract or general notice, the onus of proving the qualification being on the party setting it up, but proof of a general notice of limitation of liability must be such as amounts to actual notice. Emblazoning the general object on a check, ticket, or notice, in large letters, but stating the restriction in small ones, is insufficient. But the effect of such notice is no more than to render the bailees private carriers for hire. *Verner v. Sweitzer*, 32 Pa. St. 208; *Camden, etc., R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481; *Beckman v. Shouse*, 5 Rawle (Pa.), 179, 28 Am. Dec. 653; *Atwood v. Reliance Transp. Co.*, 9 Watts. (Pa.) 87, 34 Am. Dec. 503; *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533; *Bingham v. Rogers*, 6 W. & S. (Pa.) 495, 40 Am. Dec. 581; *Lake Shore, etc.,*

*R. Co. v. Rosenzweig*, 113 Pa. St. 519.

4. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 383; *Southern Express Co. v. Crook*, 44 Ala. 469, 4 Am. Rep. 140; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *Newman v. Smoker*, 25 La. Ann. 303; *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68; *Baltimore, etc., R. Co. v. Brady*, 32 Md. 333; *Graham v. Davis* 4 Ohio St. 362, 62 Am. Dec. 285. But see *Jones v. Voorhees*, 10 Ohio, 145.

5. See cases cited last two preceding notes.

6. *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64; *The Majestic*, 60 Fed. 624; *Louisville, etc., R. Co. v. Nicholai*, 4 Ind. App. 119; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Smith v. North Carolina R. Co.*, 64 N. C. 235.

the passenger after he has entered upon his journey, does not affect his rights.<sup>7</sup>

## § 2. Essentials of contract limiting liability for negligence.

In all jurisdictions where the right of the carrier to limit its liability by notice is denied, it is held that an express contract by parol or in writing is necessary to effect such purpose.<sup>8</sup> Such a contract to be binding upon a party must be made by him, or by some one authorized to act in his behalf. Such authority may sometimes be implied from certain contract relations existing between the parties, as between master and servant, or principal and agent; but no such implication can arise, when the relations of the parties are regulated and defined by statute, as in the case of railway mail agents.<sup>9</sup> Such a contract may be either oral or written. A parol agreement, when established, is as valid as a written agreement.<sup>10</sup> The fact that a written contract is not signed by the passenger is immaterial when its validity in other respects is established. For example, the failure of a passenger to sign

7. *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212; *Prentice v. Decker*, 49 Barb. (N. Y.) 21; *Limburger v. Westcott*, 49 Barb. (N. Y.) 283; *Sunderland v. Westcott*, 40 How. Pr. (N. Y.) 468, 2 Sw. (N. Y.) 260; *Kansas City, etc., R. Co. v. Rodebaugh*, 38 Kan. 45, 5 Am. St. Rep. 715.

8. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344. And see cases generally cited in notes 1 and 2, § 1.

9. *Kenney v. New York Cent., etc., R. Co.*, 125 N. Y. 422; *Brewer v. New York, etc., R. Co.*, 124 N. Y. 59, 21 Am. St. Rep. 647; *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Stinson v. New York Cent. R. Co.*, 32 N. Y. 233, 88 Am. Dec. 332; *Blair v. Erie R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Elliott v.*

*New York Cent., etc., R. Co.*, 33 St. Rep. (N. Y.) 861, 11 N. Y. Supp. 691; *Coppock v. Long Island R. Co.*, 89 Hun (N. Y.), 186. But see *Alexander v. Toronto, etc., R. Co.*, 35 U. C. Q. B. 453.

10. *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365; *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 447, 54 Am. Rep. 634; *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 136; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *Phillips v. Georgia, etc., R. Co.*, 93 Ga. 356; *Louisville, etc., R. Co. v. Nicholai*, 4 Ind. App. 119; *American Transp. Co. v. Moore*, 5 Mich. 368; *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183; *Walker v. York, etc., R. Co.*, 22 Eng. L. & Eq. 315.

an agreement on the back of a free railroad pass, which expressly declares that it is given to him "provided he signs the agreement," is immaterial where he accepts and uses the pass.<sup>11</sup> When a passenger accepts an excursion ticket at a reduced rate he is bound by the limitations as to time limit,<sup>12</sup> and any lawful limitation of liability contained in tickets for ocean voyages are impliedly assented to by acceptance and use of the ticket.<sup>13</sup> Proof of assent to a verbal contract must be clear and sufficient to satisfy the jury that such a contract exists between the parties; if in writing, the writing must be shown.<sup>14</sup> The contract must be founded on a good or valuable consideration, such as the reduction of the passenger's fare or something equivalent,<sup>15</sup> or convey-

11. *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, 29 Am. L. Reg. 386, 8 Ry. & Corp. L. J. 68, 30 Cent. L. J. 395, 41 Alb. L. J. 229, 40 Am. & Eng. R. Cas. 693, 23 N. E. 205, 5 L. R. A. 846; *Adams Express Co. v. Haynes*, 42 Ill. 89; *Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. C. 353. But see *Kansas City, etc., R. Co. v. Rodebaugh*, 38 Kan. 45, 5 Am. St. Rep. 715; *Anderson v. Canadian Pac. R. Co.*, 17 Ont. Rep. 747, 40 Am. & Eng. R. Cas. 624.

In England such contracts by statute must be written or printed and signed by the shipper or passenger. *Simms v. Great Western R. Co.*, 18 C. B. 805, 86 E. C. L. 805, 26 L. J. C. P. 25.

Under the South Dakota statute the passenger's signature is necessary, except that acceptance of a ticket or written contract with knowledge of its terms is an assent to the rate of hire and the time, place, and manner of delivery. *Mener v. Chicago, etc., R. Co.*, 5 S. Dak. 568. And see *Hart-*

*well v. Northern Pac. Express Co.*, 5 Dak. 463.

12. *Johnson v. Philadelphia, etc., P. Co.*, 63 Md. 106; *Pennington v. Philadelphia, etc., R. Co.*, 62 Md. 95; *Howard v. Chicago, etc., R. Co.*, 61 Miss. 194.

13. *Steers v. Liverpool, etc., Steamship Co.*, 57 N. Y. 1, 15 Am. Rep. 453; *The Majestic*, 60 Fed. 624; *O'Regan v. Cunard Steamship Co.*, 160 Mass. 361, 39 Am. St. Rep. 484; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660.

14. *American Transp. Co. v. Moore*, 5 Mich. 368; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 383; *Louisville, etc., R. Co. v. Nicholai*, 4 Ind. App. 119; *Walker v. York, etc., R. Co.*, 22 Eng. L. & Eq. 315.

15. *N. Y.—Pendergast v. Union Ry. Co.*, 10 App. Div. (N. Y.) 207, 41 N. Y. Supp. 927; *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; *Boswell*

ance by a particular mode of conveyance.<sup>16</sup> But the performance of a duty which the carrier is already under a legal obligation to perform, as the carrying of a mail agent free, is an insufficient consideration.<sup>17</sup> The limitation in such contract must be such as is deemed just and reasonable in law, and whether it is so or not is usually held to be a question of law under the circumstances of the case.<sup>18</sup> The Texas cases hold that the party who asserts the

*v. Hudson River R. Co.*, 5 Bosw. (N. Y.) 699; *Dow v. Syracuse, etc., R. Co.*, 81 App. (N. Y.) 362, 80 N. Y. Supp. 941.

*U. S.—York Co. v. Illinois Cent. R. Co.*, 3 Wall. (U. S.) 107.

*Ala.—Western R. Co. v. Harwell*, 91 Ala. 340.

*Ark.—St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104; *Taylor v. Little Rock, etc., R. Co.*, 39 Ark. 148.

*Ill.—Illinois Cent. R. Co. v. Morrison*, 19 Ill. 135.

*Kan.—Kansas Pac. R. Co. v. Reynolds*, 17 Kan. 251.

*Md.—Baltimore, etc., R. Co. v. Brady*, 32 Md. 333.

*Mass.—Squire v. New York Cent. R. Co.*, 98 Mass. 248, 93 Am. Dec. 162; *Perry v. Thompson*, 98 Mass. 249.

*Tenn.—Louisville, etc., R. Co. v. Gilbert*, 88 Tenn. 430; *Dillard v. Louisville, etc., R. Co.*, 2 Lea (Tenn.), 288.

*Vt.—Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247, 62 Am. Dec. 567.

*Can.—Alexander v. Toronto, etc., R. Co.*, 33 U. C. Q. B. 474, 35 U. C. Q. B. 453.

*Eng.—Gallin v. London, etc., R. Co.*, L. R. 10 Q. B. 212; *Hall v.*

*Northeastern R. Co.*, L. R. 10 Q. B. 437.

16. *Arnold v. Illinois Cent. R. Co.*, 83 Ill. 273, 25 Am. Rep. 386.

17. *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75.

18. *U. S.—Muser v. Holland*, 17 Blackf. (U. S.) 412; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331; *Eells v. St. Louis, etc., R. Co.*, 52 Fed. 903; and cases cited, § 1, note 2.

*Ala.—Louisville, etc., R. Co. v. Oden*, 80 Ala. 38; *South, etc., R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578.

*Ind.—See cases cited*, § 1, note 2.

*Kan.—Sprague v. Missouri Pac. R. Co.*, 34 Kan. 347.

*Mo.—Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239, 57 Rep. 382.

*Ohio.—United States Express Co. v. Backman*, 28 Ohio St. 144.

*Tenn.—Merchants' Dispatch Transp. Co. v. Block*, 86 Tenn. 397, 6 Am. St. Rep. 847; *Marr v. Western Union Tel. Co.*, 85 Tenn. 542.

*Tex.—Fort Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166.

*W. Va.—Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748.



reasonableness of a contract must allege the facts which make it so, and that it is a question for the jury.<sup>19</sup>

### § 3. Limitation of liability for negligence.

The general rule in the Federal and State courts is that the duty of a common carrier of passengers to use extraordinary diligence to protect the lives and persons of its passengers cannot be waived, or its legal liability for the consequences of its own negligence limited, even by express contract; and, hence, a contract by which the carrier undertakes to relieve itself from the consequences of its negligence or that of its servants cannot be enforced. This rule applies to both carriers of goods and carriers of passengers for hire, and with special force to the latter.<sup>20</sup> The stringent rule laid

Wis.—*Adams v. Milwaukee, etc., R. Co.*, 87 Wis. 485.

Eng.—*Simons v. Great Western R. Co.*, 18 C. B. 805, 86 E. C. L. 805, 26 L. J. C. P. 25.

19. See Texas cases cited in last preceding note.

20. *U. S.*—*New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331; *Kentucky Bank v. Adams Express Co.*, 93 U. S. 174; *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. (U. S.) 123; *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264; *The Saratoga*, 20 Fed. 839; *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. (U. S.) 344; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 658; *Baltimore, etc., R. Co. v. McLaughlin*, 73 Fed. 519; *The Iowa*, 50 Fed. 561; *Muser v. Holland*, 17 Blatchf. (U. S.) 412; *Express Co. v. Kountze*, 8 Wall. (U. S.) 342; *Earnest v. Southern Express Co.*, 1

*Woods (U. S.)*, 573; *Northern Pac. R. Co. v. Adams*, 116 Fed. 324.

Ala.—*Louisville, etc., R. Co. v. Oden*, 80 Ala. 38; *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597; *South, etc., Alabama R. Co. v. Henlein*, 56 Ala. 368; *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *Southern Express Co. v. Crook*, 44 Ala. 409, 4 Am. Rep. 140; *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 489, 94 Am. Dec. 607.

Ark.—*St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635; *Little Rock, etc., R. Co. v. Talbot*, 39 Ark. 523, 47 Ark. 97; *Taylor v. Little Rock, etc., R. Co.*, 39 Ark. 148.

Colo.—*Overland Mail, etc., Co. v. Carroll*, 7 Colo. 43; *Merchants' Dispatch, etc., Co. v. Cornforth*, 3 Colo. 280, 25 Am. Rep. 757.

Conn.—*Griswold v. New York, etc., R. Co.*, 53 Conn. 371, 55 Am. Rep. 115; *Camp v. Hartford, etc., Steamboat Co.*, 43 Conn. 333; *Lawrence v.*

down by the authorities cited as to the right to limit the duty and

New York, etc., R. Co., 36 Conn. 63.

*Del.*—Flinn v. Philadelphia, etc., R. Co., 1 Houst. (Del.) 469.

*D. C.*—Galt v. Adams Express Co., McArthur & M. (D. C.) 138.

*Ga.*—Central of Ga. Ry. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202; Southern Ry. Co. v. Watson, 110 Ga. 681, 36 S. E. 209; Phillips v. Georgia R., etc., Co., 93 Ga. 356; Western etc., R. Co. v. Exposition Cotton Mills, 81 Ga. 522; Georgia R. Co. v. Gann, 68 Ga. 350; Berry v. Cooper, 28 Ga. 543.

*Ind.*—Cleveland, etc., Ry. Co. v. Henry, 170 Ind. 94, 83 N. E. 710, revg. 80 N. E. 636; Terre Haute, etc., R. Co. v. Sherwood, 132 Ind. 129; St. Louis, etc., R. Co. v. Smuck, 49 Ind. 302; Adams Express Co. v. Frederick, 38 Ind. 150. And see cases cited, § 1, note 2.

*Iowa.*—See cases cited, § 1, note 2.

*Kan.*—Pacific Express Co. v. Foley, 46 Kan. 457, 26 Am. St. Rep. 107.

*Ky.*—Louisville, etc., R. Co. v. Bell, 100 Ky. 203; Louisville, etc., R. Co. v. Brownlee, 14 Bush (Ky.), 590; Orndorff v. Adams Express Co., 3 Bush. (Ky.) 194, 96 Am. Dec. 207.

*La.*—Randall v. New Orleans, etc., R. Co., 45 La. Ann. 778, 13 So. 166; Newman v. Smoker, 25 La. Ann. 303. But see Higgins v. New Orleans, etc., R. Co., 28 La. Ann. 133.

*Me.*—Fillebrown v. Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606.

*Md.*—Baltimore, etc., R. Co. v. Brady, 32 Md. 333.

*Mass.*—Graves v. Lake Shore, etc., R. Co., 137 Mass. 33, 50 Am. Rep. 282; School Dist. v. Boston, etc., R.

Co., 102 Mass. 556, 3 Am. Rep. 502; Squire v. New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162. But see cases cited, § 1, note 2.

*Mich.*—Hawkins v. Great Western R. Co., 17 Mich. 57, 97 Am. Dec. 179.

*Minn.*—Boehl v. Chicago, etc., R. Co., 44 Minn. 191.

*Miss.*—Johnson v. Alabama, etc., R. Co., 69 Miss. 191, 30 Am. St. Rep. 534.

*Mo.*—Baker v. Missouri Pac. R. Co., 34 Mo. App. 98; Nickey v. St. Louis, etc., R. Co., 35 Mo. App. 79; Doan v. St. Louis, etc., R. Co., 38 Mo. App. 408; Ball v. Wabash, etc., R. Co., 83 Mo. 574. See also, cases cited, § 1, note 2.

*Neb.*—Atchison, etc., R. Co. v. Washburn, 5 Neb. 117.

*N. H.*—Moses v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222. And see cases cited, § 1, note 2.

*N. C.*—Branch v. Wilmington, etc., R. Co., 88 N. C. 573. But see Seaboard Air Line Ry. v. Main, 132 N. C. 445, 43 S. E. 930, where the purpose of a contract is not to exempt the company from liability for negligence, but to indemnify it in case it should be liable.

*Ohio.*—Baltimore, etc., R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; United States Express Co. v. Backman, 28 Ohio St. 144; Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391. See also, cases cited, § 1, note 2.

*Or.*—Richmond v. Southern Pac. R. Co. (Or.), 67 Pac. 947; Seller v. Steamship Pacific, 1 Or. 409.

liability of carriers of passengers is based upon reasons of public policy, as well as a regard for the safety of the passenger on his own account. The State or government as *parens patriae*, has an interest in protecting the lives and limbs of its subjects. The employment of the carrier is of such nature as to make it a matter of public concern and for the public good that the essential duties attached to it by statute or the common law should not be the subject of or dependent on contract, but compliance therewith should be exacted of the carrier without regard to the will or wish of the carrier, or of the persons who transact business with it in the course of its employment.<sup>21</sup> The established rule in Illinois is that the carrier may by express contract stipulate for exemption from

*Pa.*—Pennsylvania R. Co. v. Fries, 87 Pa. St. 234; Adams Express Co. v. Sharpless, 77 Pa. St. 516; Grogan v. Adams Express Co., 114 Pa. St. 523, 60 Am. Rep. 360; Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577, 4 Am. St. Rep. 670; Adams Express Co. v. Holmes (Pa.), 8 Cent. Rep. 155. And see cases cited, § 1, note 2.

*R. I.*—Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881.

*S. C.*—Johnstone v. Richmond, etc., R. Co. (D. C.), 17 S. E. 512; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258; Piedmont Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353; Oliver v. Columbia, etc., R. Co., 61 S. C. 1, 43 S. E. 307.

*Tenn.*—Louisville, etc., R. Co. v. Sowell, 90 Tenn. 17; Louisville, etc., R. Co. v. Manchester Mills, 88 Tenn. 653. And see cases cited, § 1, note 2.

*Tex.*—Missouri, etc., R. Co. v. Flood (Tex. Civ. App.), 70 S. W. 1106; Fort Worth, etc., R. Co. v. Greathouse, 82 Tex. 104. And see cases cited, § 1, note 2, § 2, note 11.

Forth Worth, etc., R. Co. v. Rogers, 21 Tex. Civ. App. 605, 53 S. W. 366.

*Utah.*—Williams v. Railroad Co., 18 Utah, 210.

*Vt.*—Mann v. Birchard, 40 Vt. 326.

*Va.*—Norfolk, etc., R. Co. v. Tanner (Va.), 41 S. E. 721; Richmond, etc., R. Co. v. Payne, 86 Va. 481.

*Wash.*—Muldoon v. Seattle City R. Co., 7 Wash. 528, 38 Am. St. Rep. 901.

*W. Va.*—Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

*Wis.*—Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485. And see cases cited, § 1, note 2.

See also, cases generally cited in note 32, chap. 10, § 16, Carriers of Goods.

21. Louisville, etc., R. Co. v. Taylor, 126 Ind. 126; Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360; Gulf, etc., R. Co. v. McGown, 65 Tex. 640. And cases generally cited in last preceding note.

ordinary negligence but not from gross negligence.<sup>22</sup> And a distinction has been made in some of the cases in States where a different rule prevails between ordinary and gross negligence.<sup>23</sup> But the best considered cases disapprove of the distinctions sought to be made between ordinary and gross negligence as being too artificial and vague for clear definition or practical application.<sup>24</sup>

**22.** *Belt Ry. Co. v. Banieki*, 102 Ill. App. 642; *Illinois Cent. R. Co. v. Anderson*, 184 Ill. 294, 56 N. E. 331; *Wabash, etc., R. Co. v. Jaggerman*, 115 Ill. 407; *Chicago, etc., R. Co. v. Chapman*, 133 Ill. 96, 23 Am. St. Rep. 587; *Boscowitz v. Adms Express Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Illinois Cent. R. Co. v. Jonte*, 13 Ill. App. 424; *Erie R. Co. v. Wilcox*, 84 Ill. 239; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85; *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 136; *Adams Express Co. v. Haynes*, 42 Ill. 89. And cases cited, § 1, note 2. The same rule is maintained in Montana. *John v. Northern Pac. Ry. Co.*, 42 Mont. 18, 111 Pac. 632.

**23.** *N. Y.*—*Steers v. Liverpool, etc., Steamship Co.*, 57 N. Y. 1, 15 Am. Rep. 453; *French v. Buffalo, etc., R. Co.*, 4 Keyes (N. Y.), 108; *Boswell v. Hudson River R. Co.*, 5 Bosw. (N. Y.) 699; *Smith v. New York Cent. R. Co.*, 29 Barb. (N. Y.) 132; *Bissell v. New York Cent. R. Co.*, 29 Barb. (N. Y.) 602.

*Ind.*—*Thayer v. St. Louis, etc., R. Co.*, 22 Ind. 26, 85 Am. Dec. 409; *Indiana Cent. R. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339; *Indianapolis, etc., R. Co. v. Remmy*, 13 Ind. 518.

*Ky.*—*Illinois Cent. R. Co. v. Stew-*

*art*, 23 Ky. L. Rep. 637, 63 S. W. 596; *Chesapeake & O. R. Co. v. Dodge*, 23 Ky. L. Rep. 1959, 66 S. W. 606.

*Md.*—*Baltimore, etc., R. Co. v. Brady*, 32 Md. 333.

*Pa.*—*Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 532; *Bingham v. Rogers*, 6 W. & S. (Pa.) 495, 40 Am. Dec. 581; *Atwood v. Reliance Transp. Co.*, 9 Watts (Pa.), 89, 34 Am. Dec. 503; *Beckman v. Shouse*, 5 Rawle (Pa.), 179, 25 Am. Dec. 653.

*S. Dak.*—*Meuer v. Chicago, etc., R. Co.*, 5 S. Dak. 568.

*W. Va.*—*Baltimore, etc., R. Co. v. Skeels*, 3 W. Va. 556.

*Wis.*—*Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46, 58 Am. Rep. 848; *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 455, 54 Am. Rep. 634; *Richardson v. Chicago, etc., R. Co.*, 61 Wis. 596; *Black v. Goodrich Transp. Co.*, 55 Wis. 322, 42 Am. Rep. 713.

*Eng.*—*Great Western R. Co. v. Glenister*, 29 L. T. N. S. 422.

**24.** *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 495; *Steamboat New World v. King*, 16 How. (U. S.) 474; *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468; *Stringer v. Alabama, etc., R. Co.*, 99 Ala. 397, 13 So. 75; *Purple v. Union Pac. R. Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700; *Denver, etc., R.*

#### § 4. The New York rule.

The early New York cases, following the decisions of the United States Supreme Court, held that a common carrier of passengers might limit its liability by contract, but not for the negligence of itself or its servants.<sup>25</sup> And other cases held that the carrier might exempt itself from liability for the ordinary negligence of itself or its servants, but not for gross negligence.<sup>26</sup> The courts finally made a distinction between the negligence of the carrier itself and that of its servants and asserted the rule that the carrier of passengers might enter into special contracts with its passengers for exemption from any degree of liability on the part of its servants, but that no contract could exempt it from liability for its own personal negligence, or the negligence of the directors or managing officers directly representing the company when the carrier is a corporation.<sup>27</sup> The prin-

*Co. v. Peterson* (Colo.), 39 Pac. 578; *Griswold v. New York, etc.*, R. Co., 53 Conn. 371, 55 Am. Rep. 115; *Briggs v. Taylor*, 23 Vt. 180; *Ohio, etc.*, R. Co. v. *Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *Ohio, etc.*, R. Co. v. *Selby*, 47 Ind. 484, 17 Am. Rep. 719; *Rose v. Des Moines Valley R. Co.*, 37 Iowa. 246; *Sager v. Portsmouth, etc.*, R. Co., 31 Me. 228, 50 Am. Dec. 659; *Qimby v. Boston, etc.*, R. Co., 150 Mass. 365; *Jacobus v. St. Paul, etc.*, R. Co., 20 Minn. 125, 18 Am. Rep. 360; *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228; *Atchison, etc.*, R. Co. v. *Washburn*, 5 Neb. 117; *Cleveland, etc.*, R. Co. v. *Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Maslin v. Baltimore, etc.*, R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

25. *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 490, 62 Am. Dec. 125; *Stoddard v. Long Island R. Co.*, 5 Sandf. (N. Y.) 180; *Moore v. Ev-*

*ans*, 14 Barb. (N. Y.) 524; *Parsons v. Monteath*, 13 Barb. (N. Y.) 353.

26. *Steers v. Liverpool, etc., Steamship Co.*, 57 N. Y. 1, 15 Am. Rep. 453; *Smith v. New York Cent. R. Co.*, 29 Barb. (N. Y.) 132; *Boswell v. Hudson Riv. R. Co.*, 5 Bosw. (N. Y.) 699. But in *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, it was held that there was no reason why the carrier should be responsible for the gross negligence, which is another name for criminal negligence, of its servants, more than for slight negligence.

27. *Wilson v. New York Cent., etc.*, R. Co., 97 N. Y. 87; *Blair v. Erie R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Stinson v. New York Cent. R. Co.*, 32 N. Y. 333, 88 Am. Dec. 332; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 282; *Smith v. New York Cent. R. Co.*, 24 N. Y. 222; *Bissell v. New York Cent. R. Co.*,

ciple is that the parties cannot contract that they themselves may with impunity be guilty of willful misconduct, or of that degree of recklessness which is its equivalent. To this extent, no doubt, carriers of passengers are precluded from absolving themselves by contract from their responsibilities. But the rule has no application to contracts exempting them from liability for the acts of third persons.<sup>28</sup> This rule has been followed in New Jersey,<sup>29</sup> and applied in other States as to limitations contained in passes, while the general rule has been approved as to passengers for hire.<sup>30</sup> This distinction between the negligence of the

25 N. Y. 442; *Wells v. New York Cent. R. Co.*, 24 N. Y. 181; *Coppock v. Long Island R. Co.*, 89 Hun (N. Y.), 186, 34 N. Y. Supp. 1039; *French v. Buffalo, etc., R. Co.*, 4 Keyes (N. Y.), 108; *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364.

28. *Perkins v. New York Central R. Co.*, 24 N. Y. 196, wherein Selden, C. J., says: "There is some difficulty in applying these principles to railroad companies on account of the artificial nature of the corporations. As they can act only through agents, it may with equal plausibility be said, on the one hand, that every act of their authorized agents, and, on the other, that no such act, is to be regarded as a direct act of the corporation. But a distinction is no doubt made between the directors or managing officers of a corporation and its subordinate agents. As the former exercise all the powers of the corporation, and are its only direct medium of communication with outside parties, they must, in respect to all its external relations, be considered as identical with the corporation itself. No contract, therefore, can ex-

empt a railroad company from liability for the willful or wanton misconduct or gross recklessness of its directors; but the rule extends to no other officer or agent of the company."

As to the general scope of the rule, the same justice, in *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442, says: "The principle being established that parties may lawfully enter into contracts of this nature, there is no limit to the extent and variety of modification which may be given to such contracts. The passenger may assume all risks arising from the condition of the tracks, or from the condition of the locomotive, or of the cars, or all risks from the negligence of the agents, of all of them, or of any class of them. There is no danger which the party may encounter, resulting from the journey, which he may not assume the responsibility of, and he may assume all or any portion of it."

29. *Kinney v. Central R. Co.*, 32 N. J. L. 407, 90 Am. Dec. 675; *Ashmore v. Pennsylvania Steam Towing, etc., Co.*, 28 N. J. L. 180.

30. *Griswold v. New York, etc., R.*

carrier and that of its servants is, however, expressly disapproved of in other cases which maintain the general rule, it being held that the negligence of the agent of whatever grade, as to matters within the scope of his employment, with reference to passengers, is the negligence of the corporation itself, which fixes a liability which the carrier cannot be permitted to avoid by contract.<sup>31</sup> But, although the courts of New York have carried the power of the common carrier to make special contracts to the extent of enabling it to exonerate itself from the effects of even gross negligence of its servants, this effect has never been given to a contract general in its terms or by implication. The rule has been firmly maintained that contracts will not be construed to exempt the carrier from liability for negligence unless expressed in unequivocal terms. General words in the contract of a carrier of persons or of goods, limiting its responsibility, will not be construed as exempting it from liability for negligence, if capable of other construction.<sup>32</sup>

### § 5. The English rule.

The English rule, prior to the passage of the Railway and Canal

Co., 53 Conn. 301, 55 Am. Rep. 115, Higgins v. New Orleans, etc., R. Co., 28 La. Ann. 133; Rogers v. Kennebec Steamboat Co., 86 Me. 261; Quimby v. Boston, etc., R. Co., 150 Mass. 365; Muldoon v. Seattle, etc., R. Co., 7 Wash. 528, 38 Am. St. Rep. 901; Annas v. Milwaukee, etc., R. Co., 67 Wis. 46, 58 Am. Rep. 848.

31. New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 378; Walsh v. Pittsburg, etc., R. Co., 10 Ohio St. 75, 75 Am. Dec. 490; Toledo, etc., R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Gulf, etc., R. Co. v. McGown, 65 Tex. 465.

32. Zimmer v. New York, etc., R.

Co., 137 N. Y. 460; Kenney v. New York Cent., etc., R. Co., 125 N. Y. 422; Brewer v. New York, etc., R. Co., 124 N. Y. 59, 21 Am. St. Rep. 647; Nicholas v. New York Cent., etc., R. Co., 89 N. Y. 370; Holsapple v. Rome, etc., R. Co., 86 N. Y. 275; Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Blair v. Erie R. Co., 66 N. Y. 313; 23 Am. Rep. 55; Maginn v. Dinsmore, 56 N. Y. 168; Stinson v. New York Cent. R. Co., 32 N. Y. 333, 83 Am. Dec. 332; Perkins v. New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282; Elliott v. New York Cent., etc., R. Co., 33 St. Rep. (N. Y.) 861; Smith v. New York Cent. R. Co., 29 Barb. (N. Y.) 132.

Traffic Act in 1854, except in a few of the early cases, was that common carriers could, by express contract or notice, exempt themselves from liability for any degree of negligence.<sup>33</sup> After the passage of that act the rule was established by the courts that a carrier might exempt itself from liability for negligence by express contract, but not by notice, provided the limitations contained in the contract were just and warrantable,<sup>34</sup> but liability for willful misconduct could not be avoided by contract.<sup>35</sup>

### § 6. Limitation of liability for negligence as to particular classes of passengers.

The application by the courts of the rules as to contracts limiting the carrier's liability for negligence has depended in many instances upon the relation existing between the carrier and the passenger, whether the passenger was a gratuitous passenger or a passenger for hire, an employe of the carrier, or an employe of third persons contracting with the carrier. As to gratuitous passengers it has been held that a stipulation in a free railway pass, requiring the user to assume the risk of personal injury due to the carrier's negligence, or that of its servants, is binding on the person accepting the privilege, although notice of such stipulation may not have been brought home to such person, the rule of public policy making such conditions void as to passengers for hire being held not to apply to passes.<sup>36</sup> In some of the States the same

33. *Slims v. Great Northern R. Co.*, 14 C. B. 647, 78 E. C. L. 647; *York, etc., R. Co. v. Crisp*, 14 C. B. 527, 78 E. C. L. 527.

34. *Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582, 109 E. C. L. 582; *Simons v. Great Western R. Co.*, 18 C. B. 805, 86 E. C. L. 805, 26 L. J. C. P. 25; *Lewis v. Great Western R. Co.*, 5 H. & N. 867.

35. *Great Western R. Co. v. Glenister*, 29 L. T. N. S. 422.

36. *Blank v. Illinois Cent. R. Co.*,

182 Ill. 332, 55 N. E. 332; *Russell v. Pittsburgh, etc., R. Co.*, 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253; *Boering v. Chesapeake Beach Ry. Co.*, 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742, affg. 20 App. D. C. 500; *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Muldoon v. Seattle City R. Co.*, 10 Wash. 311, 38 Pac. 995; *Griswold v. New York, etc., R. Co.*, 53



rule has been applied to gratuitous passengers as to passengers for hire, whether the rule denied the right of the carrier to stipulate for exemption from negligence or allowed it wholly or partly to do so.<sup>37</sup> A contract by an express messenger, relieving a railroad company from liability for personal injuries to him while riding on its train in the performance of his duties, caused by the ordinary negligence of the railroad's employes, is valid, and not contrary to public policy.<sup>38</sup> But an express messenger is not bound by such a stipulation in a contract between a railroad company and his employer, when it does not appear that he had any knowledge or information of the provisions of the contract between the two companies.<sup>39</sup> A contract, however, by which an express messenger, as a condition of his employment, assumes all risk of personal injury while riding on any transportation line,

Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; Illinois Cent. R. Co. v. Read, 37 Ill. 484, 510, 87 Am. Dec. 260; Duncan v. Maine Cent. R. Co., 113 Fed. 508; Rogers v. Kennebec Steamboat Co., 86 Me. 261; Higgins v. New Orleans, etc., R. Co., 28 La. Ann. 133; Annas v. Milwaukee, etc., R. Co., 67 Wis. 46, 58 Am. Rep. 848; Baltimore, etc., R. Co. v. Voigt, 176 U. S. 498, 20 S. Ct. 385, 44 L. Ed. 560; Payne v. Terre Haute, etc., R. Co., 157 Ind. 616, 62 N. E. 472; Chicago, etc., R. Co. v. Hambel (Neb.), 89 N. W. 643.

37. Ulrich v. New York Cent., etc., R. Co., 108 N. Y. 80, 2 Am. St. Rep. 369; Perkins v. New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282; Wells v. New York Cent. R. Co., 24 N. Y. 181; Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Toledo, etc., R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Rose v. Des Moines Valley R. Co., 39 Iowa, 246; Jacobus v. St. Paul, etc., R.

Co., 20 Minn. 125, 18 Am. Rep. 360; Huckstep v. St. Louis & H. Ry. Co., 166 Mo. App. 330, 148 S. W. 988; Bryan v. Missouri Pac. R. Co., 32 Mo. App. 228; Camden, etc., R. Co. v. Bausch (Pa.), 7 Atl. 731; Kinney v. Central R. Co., 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 513, 3 Am. Rep. 265; Gulf, etc., R. Co. v. McGown, 65 Tex. 640.

38. Peterson v. Chicago, etc., R. Co., 119 Wis. 197, 96 N. W. 532. And see Hosmer v. Old Colony R. Co., 156 Mass. 506; Bates v. Old Colony R. Co., 147 Mass. 255; Doyle v. Fitchburg R. Co., 162 Mass. 66, 44 Am. St. Rep. 335.

39. Kenney v. New York Cent., etc., R. Co., 125 N. Y. 422; Brewer v. New York, etc., R. Co., 124 N. Y. 59, 21 Am. St. Rep. 647. And see Blair v. Erie R. Co., 66 N. Y. 313, 23 Am. Rep. 55. But see Blank v. Illinois Cent. R. Co., 182 Ill. 332, 55 N. E. 232.

and agrees to release and indemnify the company or any transportation company with which it may contract from any claim which might be made on account of any such injury, must be construed to apply to an injury resulting from negligence of a railroad company in whose car he is riding in the course of his employment, since, not being a passenger while so riding, no claim could be made against the company except on the ground of negligence, and is effective to prevent such messenger from recovering from a railroad company for injury in a collision due to the negligence of the railroad's employees.<sup>40</sup> Where, by an agreement between a railroad company and a land owner, the railroad agreed, in consideration of a grant of a right of way, to give the land-owner transportation for life, on the sole condition that her right to transportation should be forfeited if tickets were presented by any one save herself, and the tickets given the land-owner bore a provision exempting the railroad from liability for injuries, such condition was not binding on the land-owner in an action by her for injuries owing to the road's negligence, since it was without consideration, and her acceptance of the tickets did not indicate an intention on her part to assent to the terms thereof.<sup>41</sup> Where a passenger bought from a railroad company an excursion ticket at a reduced rate, with indorsement that the person accepting it assumes all risk of accident and damage, the acceptance of the ticket was a waiver of the common law rule making the carrier liable for the passenger's safety, and he must affirmatively prove negligence on the part of the carrier, and cannot avail himself of the presumption of negligence arising in favor of the passenger where an injury occurs.<sup>42</sup> Persons accompanying stock and travel-

40. *Long v. Lehigh Valley R. Co.* (U. S. C. C. A. N. Y.), 130 Fed. 870.

41. *Dow v. Syracuse, etc., R. Co.*, 81 App. Div. (N. Y.) 362, 80 N. Y. Supp. 941. See also, *Coreoran v. New York Cent., etc., R. Co.*, 25 App. Div. (N. Y.) 479, 49 N. Y. Supp. 701, 164

N. Y. 587, 58 N. E. 1086; *Trolan v. New York Cent., etc., R. Co.*, 31 App. Div. (N. Y.) 320, 52 N. Y. Supp. 257; *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Vanderbilt v. Schreyer*, 91 N. Y. 392.

42. *Crary v. Lehigh Valley R. Co.*, 203 Pa. 525, 53 Atl. 563, 59 L. R. A.

ing on drover's passes have been usually regarded as passengers for hire and the limitation of liability contained in such passes determined by the rule prevailing as to passengers for hire. Clauses limiting the carrier's liability for personal injuries due to the negligence of itself or its servants have been held void in certain jurisdictions,<sup>43</sup> while in other jurisdictions they have been held valid and sufficient to relieve the carrier from liability.<sup>44</sup> A contract made between a sleeping car company and an employe releasing the sleeping car company and all transportation companies from all liability for personal injuries while traveling over such lines inures to the benefit of a railway company transporting the car in which the employe was injured.<sup>45</sup>

A railroad company cannot by contract exempt itself from liability for negligence, and therefore the acceptance by a minor of a railroad pass containing an exemption from liability for negligence does not relieve the company from liability for an injury resulting from its negligence.<sup>46</sup> Where transportation of a railroad employe from his home to his place of employment was not gratuitous but a part of his compensation, he was not bound by a pro-

815. See also, *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. (U. S.) 344, 12 L. Ed. 465.

43. *Kirkendall v. Union Pac. R. Co.*, 200 Fed. 197, 118 C. C. A. 383; *Chicago, B. & Q. Ry. Co. v. Williams*, 200 Fed. 207, 118 C. C. A. 393; *Illinois Cent. R. Co. v. Anderson*, 184 Ill. 294, 56 N. E. 331; *Bolton v. Missouri Pac. R. Co.*, 172 Mo. 92, 72 S. W. 530; *Feldschneider v. Chicago, etc., R. Co. (Wis.)*, 99 N. W. 1034; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Pittsburgh, etc., R. Co. v. Brown*, — Ind. —, 97 N. E. 145; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362;

*Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Flinn v. Philadelphia, etc., R. Co.*, 1 Howst. (Del.) 469; *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 10 Am. St. Rep. 758.

44. *Poncher v. New York Cent. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Stinson v. New York Cent. R. Co.*, 32 N. Y. 333, 88 Am. Dec. 332; *Smith v. New York Cent. R. Co.*, 24 N. Y. 222; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; *Gallin v. London, etc., R. Co.*, L. R. 10 Q. B. 212.

45. *Russell v. Pittsburgh, etc., R. Co.*, 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253.

46. *Pennsylvania Co. v. Purvis*, 128 Ill. App. 367.

vision of his pass-book attempting to relieve the carrier from liability for injuries resulting from the negligence of the operatives of its cars.<sup>47</sup> A special contract between a carrier and a circus to furnish motive power, etc., to move the circus over the carrier's road at reduced rates, and exempting the carrier from liability for accident or injury occasioned by the carrier's negligence, was not contrary to public policy and was valid as between the railroad company and the circus.<sup>48</sup> A carrier, though prohibited from exempting itself by contract from liability for negligence in performing a service which it is its duty to perform, may, with respect to duties which it is under no obligation to perform, limit its liability, and in such cases its liability to one injured by its negligence depends on the contract.<sup>49</sup> A railroad company may

47. *Eberts v. Detroit, etc., Ry.*, 151 Mich. 260, 14 Detroit Leg. N. 889, 115 N. W. 43.

He was a passenger for hire, so that the provisions of the pass waiving his right of protection as such were void as against public policy. *Harris v. Puget Sound Elec. Ry.*, 52 Wash. 289, 100 Pac. 838.

48. *Sager v. Northern Pac. Ry. Co.*, 166 Fed. 526.

A circus train transportation contract exempting the carrier from liability to the circus and its employees for injuries sustained in the carrier's performance of the contract is not a defense, as a matter of law, to an action by a circus employe having no knowledge of such contract and not having authorized the circus company to bind him thereby, to recover from the carrier for injuries. *Id.*

But see *Cleveland, etc., Ry. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710, revg. (Ind. App.) 80 N. E. 636, holding that such employe was bound to know that the car would be drawn

to its destination under some private arrangement between his employer and the railroad and that whatever right he had to be carried over the railroad arose from such contract, and further that, when he entered the showman's service and accepted the method of transportation provided for his employes, such acceptance was subject to the conditions of the contract limiting the railroad's liability.

A carrier's contract with a circus company exempting the carrier from liability for negligence in handling the circus company's cars, and making the carrier's obligation that of a private carrier only, is valid. *Kelley v. Grand Trunk Western Ry. Co.*, 46 Ind. App. 697, 93 N. E. 616.

49. *Denver & R. G. R. Co. v. Whan*, 39 Colo. 230, 89 Pac. 39.

A railroad company and a sleeping car company entered into a contract, whereby the railroad company agreed to haul the cars of the sleeping car company, and the latter agreed that its employes injured in

make reasonable regulations for carrying passengers on its freight trains, from which they are excluded except by special permission, and an agreement by one holding a special permit to assume the risks incident to boarding the caboose of such a train at any place where it may be stopped for conducting the freight business of a company is not a limitation of a carrier's liability for its own negligence.<sup>50</sup> A contract whereby a railroad company undertook to transport the express matter and messengers of an express company, the latter assuming all risks of accidents happening to its messengers and agreeing to indemnify the railroad company against all claims made by its messengers for injuries received was valid.<sup>51</sup> A contract between an express company and a railroad company, by which the former assumed all risk of injury to its employes and agreed to hold the latter harmless from all loss arising therefrom, and a subsequent contract between the express company and a messenger, whereby the latter assumed all risk of injury from the negligence of any railroad company, are valid, in the absence of any statute on the subject, since the ex-

consequence of a railroad accident should hold the railroad company liable only to the same extent that it would be liable if the employes so injured were its own employes. A contract between the sleeping car company and its conductor stipulated that the conductor, while engaged in the performance of his duties, should not have the right of a passenger with respect to the railroad company, and released the railroad company from claims for liability for personal injury. It was held that the railroad company was entitled to enforce the provisions of the contract between the conductor and the sleeping car company and avoid a liability for an injury sustained by the conductor. *Id.*

50. *Chicago, etc., Ry. Co. v. Mann*, 78 Neb. 541, 111 N. W. 379.

Where a passenger rides on a freight train, under Laws 1907, Kan. c. 274, the railroad has no right to require him to give a release different from that designated by the statute nor to refuse to accept a passenger because he declines to give such a release. *Davis v. Atchison, etc., Ry. Co.*, 81 Kan. 303, 106 Pac. 288.

The same rule applies as to a mixed train consisting of freight cars, a passenger coach, and a combination car, regularly operated. *Schwartz v. Missouri, etc., Ry. Co.*, 83 Kan. 30, 109 Pac. 767.

51. *Robinson v. St. Johnsbury, etc., R. Co.*, 80 Vt. 129, 66 Atl. 814, 9 L. R. A. (N. S.) 1249.

press messenger is not a passenger.<sup>52</sup> A contract exacted from a cattle shipper, given free transportation to accompany his stock, providing that he would remain in a safe place in the caboose attached to the cars while the train was in motion, would get on and off the caboose only when it was stationary, and would not get on any freight car, was reasonable, and not against public policy.<sup>53</sup> In the absence of statutory restrictions, a railway company may for a reduced fare sell a particular form of ticket whereby its liability is restricted and its obligations curtailed.<sup>54</sup>

The public policy of the United States as declared by the Supreme Court allows a carrier to exempt itself from liability even for its own negligence in the case of a person traveling on a free pass.<sup>55</sup> A railroad company may, by express contract, relieve itself of liability for negligence of its servants to one riding on a free ticket.<sup>56</sup> One riding on a pass, not being a passenger, is bound by a condition therein releasing claims for injuries.<sup>57</sup> The Okla-

**52.** *Perry v. Philadelphia, etc., R. Co.* (Del. Super.), 77 Atl. 725.

Under the provisions of Gen. St. Kansas, 1901, §§ 5857, 5858, which, as construed by the Supreme Court of the State, render void any contract limiting a carrier's liability for its own negligence or that of its employes, such contracts are not available as a defense to an action against the railroad company by the widow of the employe to recover damages for his death, occurring in Kansas through the alleged negligence of the railroad company. *Weir v. Rountree*, 173 Fed. 776, 97 C. C. A. 500.

Where such contracts exist, an express company employe cannot recover of a railroad company for injuries sustained by the negligence of that company while he was being

transported in one of its cars. *Baltimore & O. R. Co. v. Duke*, 38 App. D. C. 164.

**53.** *Leslie v. Atchison, etc., Ry. Co.*, 82 Kan. 152, 107 Pac. 765.

**54.** *Miley v. Northern Pac. Ry. Co.*, 41 Mont. 51, 108 Pac. 5.

**55.** *Shelton v. Canadian Northern Ry. Co.*, 189 Fed. 153.

**56.** *Gill v. Erie R. Co.*, 135 N. Y. Supp. 153, 151 App. Div. 131, reargument and appeal to the Court of Appeals denied 136 N. Y. Supp. 1135.

An exemption clause in a pass given an employe pursuant to his contract of employment is void. *Id.*

**57.** *Malcott v. Weston* (Ind. App.), 98 N. E. 127.

A contract exempting a carrier from negligence injuring passengers is against public policy, but such a condition in a pass issued by a pri-

homa statute (Comp. Laws 1909, § 428), requiring carriers to use ordinary care for the safety of passengers carried without reward is not applicable to an employe traveling on a pass containing an express waiver of liability for injuries.<sup>58</sup> Though a condition of a pass, issued to a railway employe as a gratuity, that he assumes all risk of accident, is binding, it is not binding where the pass is issued as one of the terms of his employment.<sup>59</sup> A common carrier cannot by contract relieve itself of the duty to exercise ordinary care to avoid injuring persons carried on its cars with whom it was apparent its business would bring it in contact.<sup>60</sup> A stipulation in a free pass that the carrier shall not be liable for any personal injury sustained in consequence of the negligence of its agents, or otherwise, is void, and does not prevent the passenger from recovering for an assault committed by a porter of the carrier.<sup>61</sup> A contract exempting a common carrier from liability for negligence causing injury to a passenger carried for any compensation is against public policy, though agreed to by the passenger in consideration of special concessions as to rates or otherwise; but such a contract of exemption, except

vate carrier, though for a consideration, is valid. *Id.*; *Sullivan-Sanford Lumber Co. v. Watson* (Tex. Civ. App.), 155 S. W. 179.

58. *Smith v. Atchison, etc., Ry. Co.*, 193 Fed. 79.

59. *Dugan v. Blue Hill St. Ry. Co.*, 193 Mass. 431, 79 N. E. 748.

60. *Baker v. Boston & M. R. Co.*, 74 N. H. 100, 65 Atl. 386.

A contract between a shipper and an employe indemnifying the shipper against claims for injuries to the employe received while riding on the cars, which is based on a void indemnity contract of the same nature between the shipper and the common carrier, cannot be availed of by the carrier in an action by the employe

against the carrier for injuries. *Id.*

A shipper's contract with a carrier by which the carrier was indemnified against claims for personal injuries to the shipper's employes by reason of carrying such employes free on cars specially provided for the shipper is void where the carrier refused to furnish such special cars unless the shipper would furnish men to handle and care for the shipper's goods, and transportation according to the carrier's public duty is not afforded the shipper as an alternative, and no reduction of rates is made. *Id.*

61. *Galveston, etc., R. Co. v. Bean* (Tex. Civ. App.), 99 S. W. 721.

from willful, wanton, or gross negligence, is valid as to a passenger carried solely as a matter of favor, and without any compensation or advantage to the carrier.<sup>62</sup> A permit to ride on freight engines to learn the road and the duties of an engineer, at the party's own risk, does not cover an injury not due to any risk of riding on the engine.<sup>63</sup> A street railroad cannot, by contract made in advance, exempt itself from the penalties provided by Mass. Stat. 1907, c. 392, for the death of a passenger.<sup>64</sup> Any contract by which a common carrier of passengers undertakes to exempt itself from liability for injuries arising from negligence of itself or its servants is void as against public policy.<sup>65</sup> A carrier cannot defeat a recovery of damages by a passenger by showing the use of a pass at the time of the injury, though the acceptance of the pass was on condition that all claims for damages should be waived.<sup>66</sup> Whether a written waiver of liability for injuries to a caretaker from ordinary negligence of the carrier is valid depend upon the laws of the state where the accident happened, and not where the contract was delivered.<sup>67</sup> Where a pass issued and delivered in Kansas to a railroad employe's wife for a round trip from Kansas to Oklahoma contains a provision releasing the carrier from liability, it must be construed according to the laws of Oklahoma where such provision is valid, rather than in Kansas where it is invalid.<sup>68</sup> A notice on the back of each seat in a street railway car, "Avoid accidents. Wait until the car stops"—must

62. *Walther v. Southern Pac. Co.*, 159 Cal. 769, 116 Pac. 51.

63. *Southern Ry. Co. v. Decker*, 5 Ga. App. 21, 62 S. E. 678.

64. *Jones v. Boston & N. St. Ry. Co.*, 205 Mass. 108, 90 N. E. 1152.

65. *Checkley v. Illinois Cent. R. Co.*, 257 Ill. 491, 100 N. E. 942.

66. *Memphis, etc., R. Co. v. Steel* (Ark.), 156 S. W. 182.

67. *Fish v. Delaware, etc., R. Co.*, 141 N. Y. Supp. 245.

68. *Atchison, etc., R. Co. v. Smith* (Okl.), 132 Pac. 494. See also, *Missouri, etc., R. Co. v. West* (Okl.), 134 Pac. 655.

Where a passenger is injured while riding on a pass gratuitously given with knowledge of the conditions therein relieving the carrier from liability for the ordinary negligence of its employes, the company is not liable in the absence of willful or wanton negligence. *Id.*



be construed to have been intended by the street railway company as a caution to passengers against alighting from a car in motion, and not as an exemption from its own negligence.<sup>69</sup> A provision in a contract of shipment requiring suits for injuries to the person accompanying the same to be brought within a specified time was waived where the carrier attempted to settle a suit for such injuries brought after the expiration of the time.<sup>70</sup> Where a contract for the shipment of cattle provided for transportation for the caretaker in charge of them; the contract was signed after the cattle were loaded, and by the time it was signed the train was in motion; the conductor refused to stop the train, and the caretaker was injured while trying to get aboard the caboose, it was held that the contract, which required notice of injury to person or property as a condition precedent to an action for damages, was operative at the time of the injury.<sup>71</sup>

69. *Cameron v. Lewiston, etc., St. R. Co.*, 103 M. E. 482, 70 Atl. 584.

70. *St. Louis & S. F. R. Co. v. Dysart* (Tex. Civ. App.), 130 S. W. 1047.

71. *Barber v. Chicago, etc., Ry. Co.*, 86 Kan. 277, 120 Pac. 359.

Where a shipper of household goods and of live stock billed under a live stock bill of lading, which contains a condition that a claim in writing shall be made within five

days from the accrual of damages, was killed while accompanying the shipment, it was not a condition precedent to an action by the representative of the shipper that the notice provided by the bill of lading should have been given, since that notice referred only to claims for injuries to live stock or personal property. *Pittsburgh, etc., Ry. Co. v. Brown* (Ind.), 97 N. E. 145.

## CHAPTER XXVII.

### PRESUMPTIONS AND BURDEN OF PROOF.

- SECTION**
1. Presumptions as to negligence from mere proof of injury.
  2. Acts of servants or defects in instrumentalities of transportation.
  3. Breaking of machinery or instrumentalities, and defects therein.
  4. Presumption arising from collisions.
  5. Presumptions arising from derailment of train or car.
  6. Presumption arising from defects in means of transportation.
  7. Presumption of negligence as to injuries to persons other than passengers.
  8. Reasons for presumption of negligence.
  9. Rebutting presumption.
  10. Other presumptions.
  11. Presumptions as to contributory negligence.
  12. Presumption arising from instinct of self-preservation.
  13. Presumption and burden of proof where injury is caused by sudden jerks, or sudden or premature starting of the car.
  14. Presumption where person injured is passenger on freight train.
  15. Where injuries are caused by explosion or electric shock.
  16. Injuries to passenger in elevator.
  17. Presumption as to carrier's knowledge of violation of its rules.
  18. Statutory regulations.
  19. The burden of proving negligence.
  20. The burden of proof as to contributory negligence.
  21. Presumptions and burden of proof as to contributory negligence.
  22. Presumptions and burden of proof in actions for assault.

#### § 1. Presumptions as to negligence from mere proof of injury.

It has been frequently held that the mere fact of an accident occurring whereby injury is suffered by a passenger while on his journey is sufficient to raise a presumption of negligence and is of itself presumptive evidence of negligence on the part of the carrier.<sup>1</sup> Negligence is not generally presumed, however, from

1. When negligence presumed from mere happening of accident: *Supp.* 417; *Horowitz v. Hamburg-American Packet Co.*, 18 *Misc. Rep.* (N. Y.) 24, 41 *N. Y. Supp.* 54; *Hege-man v. Western R. Corp.*, 16 *Barb.* (N. Y.) 333; *Gonzales v. New York, etc., R. Co.*, 39 *How. Pr.* (N. Y.) 407.

the fact of damage or proof of the occurrence of an injury.<sup>2</sup> The

*U. S.*—The Warren Adams, 38 U. S. App. 356, 74 Fed. 413; Gleeson v. Virginia Midland R. Co., 140 U. S. 435; Carter v. Kansas City Cable R. Co., 42 Fed. 37; New Jersey R. Co. v. Pollard, 22 Wall. (U. S.) 341.

*Ala.*—Louisville, etc., R. Co. v. Jones, 83 Ala. 376.

*Cal.*—Bush v. Barnett, 96 Cal. 202.

*D. C.*—City, etc., R. Co. v. Svedborg, 20 App. D. C. 543.

*Ga.*—Electric R. Co. v. Carson, 98 Ga. 652; City, etc., R. Co. v. Findley, 76 Ga. 311; Southwestern R. Co. v. Singleton, 67 Ga. 306; Gardner v. Wayercross Air Line R. Co., 97 Ga. 482.

*Ill.*—Chicago City R. Co. v. Mead, 206 Ill. 174, 69 N. E. 19; Springer v. Schultz, 205 Ill. 144, 68 N. E. 753, affg. 105 Ill. App. 540; New York, etc., R. Co. v. Blumenthal, 160 Ill. 40; Illinois Cent. R. Co. v. Beebe, 69 Ill. App. 363; Elgin City R. Co. v. Wilson, 56 Ill. App. 364; West Chicago St. R. Co. v. Kennelly, 66 Ill. App. 244.

*Ind.*—Indianapolis St. Ry. Co. v. Schmidt (Ind.), 71 N. E. 201; Louisville, etc., Ferry Co. v. Nolan, 135 Ind. 60; Louisville, etc., R. Co. v. Snyder, 117 Ind. 435, 10 Am. St. Rep. 60.

*Kan.*—Atchison, etc., R. Co. v. Elder, 57 Kan. 312.

*Ky.*—Central Pass. R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. Rep. 309.

*Md.*—Baltimore, etc., R. Co. v. Swann, 81 Md. 400, 31 L. R. A. 313; Philadelphia, etc., R. Co. v. Anderson, 72 Md. 519, 20 Am. St. Rep. 483; North Baltimore Pass. R. Co. v. Kaskell, 78 Md. 517.

*Minn.*—Graham v. Burlington, etc., R. Co., 39 Minn. 81.

*Mont.*—Hamilton v. Great Falls St. R. Co., 17 Mont. 334.

*Miss.*—Vicksburg, etc., R. Co. v. Phillips, 64 Miss. 693.

*Mo.*—Madden v. Missouri Pac. R. Co., 50 Mo. App. 666; Och v. Missouri, etc., R. Co., 130 Mo. 27, 36 L. R. A. 442.

*N. J.*—Consolidated Tract. Co. v. Thalheimer, 59 N. J. L. 474.

*Pa.*—Fredericks v. Northern Cent. R. Co., 157 Pa. 103, 22 L. R. A. 306; Thomas v. Philadelphia, etc., R. Co., 148 Pa. 180, 15 L. R. A. 416; Dampfan v. Pennsylvania R. Co., 166 Pa. St. 520; Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Clow v. Pittsburgh Traction Co., 158 Pa. 410; Allam v. Pennsylvania R. Co., 3 Pa. Super. Ct. 335.

*S. C.*—Zemp v. Wilmington, etc., R. Co., 9 Rich. L. (S. C.) 84, 64 Am. Dec. 763.

*Ohio.*—Cincinnati St. R. Co. v. Kelsey, 9 Ohio C. C. 170.

*Tex.*—Bonner v. Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010; Missouri Pac. R. Co. v. Scott, 4 Tex. Civ. App. 77.

*Neb.*—Lincoln Tract. Co. v. Heller (Neb.), 100 N. W. 197; Spellman v. Lincoln Rapid Trans. Co., 36 Neb. 890, 20 L. R. A. 316; Lincoln St. R. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074.

*U. S.*—Carter v. Kansas City Cable R. Co., 42 Fed. 37, street car sliding down hill owing to slippery condition of track from frost.

2. When negligence not presumed from mere happening of accident:

presumption of the proper performance of duty applies in cases

*N. Y.*—*Holbrook v. Utica, etc.*, R. Co., 12 N. Y. 236, 64 Am. Dec. 502; *Buck v. Manhattan R. Co.*, 15 Daly (N. Y.), 550.

*Ala.*—*McDonald v. Montgomery St. R. Co.*, 11 Ala. 161, 20 So. 317; *Louisville, etc., R. Co. v. Allen*, 78 Ala. 494, 28 Am. & Eng. R. Cas. 514.

*D. C.*—*Metropolitan R. Co. v. Snashall*, 3 App. D. C. 420; *Adams v. Washington, etc., R. Co.*, 9 App. D. C. 26.

*Ill.*—*Chicago City R. Co. v. Rood*, 163 Ill. 477; *West Chicago St. R. Co. v. Kennelly*, 1 Chic. L. J. Wkly. 436; *Illinois Cent. R. Co. v. Hobbs*, 58 Ill. App. 130.

*Ind.*—*Dresslar v. Citizens St. R. Co.*, 19 Ind. App. 383, 47 N. E. 651.

*Iowa.*—*Case v. Chicago, etc., R. Co.*, 64 Iowa, 762, 19 Am. & Eng. R. Cas. 142.

*Kan.*—*Jackson v. Kansas City R. Co.*, 31 Kan. 761, 15 Am. & Eng. R. Cas. 178.

*Md.*—*State v. Baltimore, etc., R. Co.*, 58 Md. 221; *Barnard v. Philadelphia, etc., R. Co.*, 60 Md. 555, 15 Am. & Eng. R. Cas. 484; *Philadelphia, etc., R. Co. v. Stebbing*, 62 Md. 504, 19 Am. & Eng. R. Cas. 36.

*Mich.*—*Mynning v. Detroit, etc., R. Co.*, 59 Mich. 257, 23 Am. & Eng. R. Cas. 317; *Brown v. Congress, etc., R. Co.*, 49 Mich. 153, 8 Am. & Eng. R. Cas. 383.

*Mo.*—*Buesching v. St. Louis Gas Light Co.*, 6 Mo. App. 85.

*Ohio.*—*Cleveland, etc., R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633.

*Pa.*—*Delaware, etc., R. Co. v. Na-*

*pheys*, 90 Pa. Ct. 135, 1 Am. & Eng. R. Cas. 52; *Fleming v. Pittsburgh, etc., R. Co.*, 158 Pa. 130, 22 L. R. A. 351; *Herstine v. Lehigh Valley R. Co.*, 151 Pa. 144; *Farley v. Philadelphia Traction Co.*, 132 Pa. St. 58; *Federal St., etc., R. Co. v. Gibson*, 96 Pa. St. 83.

*R. I.*—*Elliott v. Newport St. R. Co.*, 18 R. I. 707, 23 L. R. A. 208.

*S. C.*—*Carter v. Columbia, etc., R. Co.*, 19 S. C. 20, 15 Am. & Eng. R. Cas. 414.

*S. Dak.*—*Saunders v. Chicago, etc., R. Co.*, 6 S. Dak. 40.

*Tenn.*—*East Tennessee, etc., R. Co. v. Stewart*, 13 Lea (Tenn.), 432, 21 Am. & Eng. R. Cas. 614.

*Tex.*—*Texas Pac. R. Co. v. Buckalew*, 3 Tex. Civ. App. 272; *Missouri Pac. R. Co. v. Freeman*, 73 Tex. 311.

*Wash.*—*Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72, 28 Pac. 1021.

*Wis.*—*Stimson v. Milwaukee, etc., R. Co.*, 75 Wis. 381.

**A presumption of negligence does not arise:**

**Coupling made in an ordinary manner.**—*Yazoo, etc., R. Co. v. Humphrey*, 83 Miss. 721, 36 So. 154.

**Passenger thrown from seat in a car in rounding a curve.**—*Wilder v. Metropolitan St. R. Co.*, 10 App. Div. (N. Y.) 364, 41 N. Y. Supp. 931, affd. 161 N. Y. 665, 57 N. E. 1128.

**Passenger falling from street car.**—*Paynter v. Bridgton, etc., Tract. Co.*, 67 N. J. L. 619, 52 Atl. 367; *Chicago City R. Co. v. Catlin*, 70 Ill. App. 97; *Etson v. Fort Wayne, etc., R. Co.*, 110 Mich. 494, 68 N. W. 298.

of alleged negligence, as in all other cases, yet the circumstances under which an injury occurred may be such as to create the presumption of negligence.<sup>3</sup> In such cases the rule, *res ipsa loqui-*

**Passenger falling from train.**—*Mitchell v. Western, etc., R. Co.*, 30 Ga. 22; *Chicago, etc., R. Co. v. Mock*, 88 Ill. 87; *Baltimore, etc., Turnpike Road v. Cason*, 72 Md. 377; *State v. Baltimore, etc., R. Co.*, 58 Md. 221; *Metropolitan R. Co. v. Snashall*, 22 Wash. L. Rep. (D. C.) 377; *East Tennessee, etc., R. Co. v. Mitchell*, 11 Heisk. (Tenn.) 400; *Chamberlain v. Milwaukee, etc., R. Co.*, 7 Wis. 425.

**Passenger injured in alighting from car.**—*Peek v. St. Louis Transit Co.*, 178 Mo. 617, 77 S. W. 736; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 15 Am. St. Rep. 701; *Delaware, etc., R. Co. v. Napheys*, 90 Pa. St. 141; *Mitchell v. Chicago, etc., R. Co.*, 51 Mich. 236, 47 Am. Rep. 566.

**Passenger injured in attempting to get on car.**—*Illinois Cent. R. Co. v. Hobbs*, 58 Ill. App. 130; *Stager v. Ridge Ave. Pass. R. Co.*, 119 Pa. St. 70; *Chicago, etc., R. Co. v. Trotter*, 60 Miss. 442; *Weber v. New Orleans, etc., R. Co.*, 104 La. 367, 28 So. 892.

**Passenger falling over satchel in aisle.**—*Farley v. Philadelphia Tract. Co.*, 132 Pa. St. 58; *Stimson v. Milwaukee, etc., R. Co.*, 75 Wis. 381.

**Passenger injured by missile thrown from outside.**—*Thomas v. Philadelphia, etc., R. Co.*, 148 Pa. St. 180; *Pennsylvania, etc., R. Co. v. McKinney*, 124 Pa. St. 462.

**Passenger injured by rock falling from hill.**—*Fleming v. Pittsburgh, etc., R. Co.*, 158 Pa. St. 130, 38 Am. St. Rep. 835.

**Accident caused by act of God.**—*Gillespie v. St. Louis, etc., R. Co.*, 6 Mo. App. 554, washing away of embankment by an unusual storm; *McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44, 19 Am. Rep. 631, upsetting of train by a cyclone.

**Accident caused by act of stranger.**—*Federal St., etc., R. Co. v. Gibson*, 96 Pa. St. 83, passenger struck by a passing loaded truck; *Chicago City R. Co. v. Rood*, 163 Ill. 477.

**Sawdust blowing from elevated railroad.**—*Wadsworth v. Boston El. R. Co.*, 60 N. E. 421, 182 Mass. 572.

**Ordinary burning out of a fuse.**—*Cassaday v. Old Colony St. R. Co. (Mass.)*, 68 N. E. 10.

**Sudden stopping of street car but not more than usually violent.**—*Johnson v. Interurban St. R. Co.*, 88 N. Y. Supp. 866.

**Falling of article placed by passenger in car rack.**—*Morris v. New York Cent., etc., R. Co.*, 106 N. Y. 678, 11 St. Rep. (N. Y.) 204.

**Passenger injured at station or while passing to train or boat.**—*Pennsylvania Co. v. Marion*, 104 Ind. 239; *Hayman v. Pennsylvania R. Co.*, 118 Pa. St. 508; *Welfare v. London, etc., R. Co.*, L. R. 4 Q. B. 693. But see *Baltimore, etc., R. Co. v. State*, 63 Md. 135; *Louisville, etc., R. Co. v. Reynolds*, 24 Ky. L. Rep. 1402, 71 S. W. 516.

**3. Seybolt v. New York, etc., R. Co.**, 95 N. Y. 562, 18 Am. & Eng. R. Cas. 162; *Lowery v. Manhattan R. Co.*, 99

*tur*, applies, and, when that which caused the injury is shown to have been under the management and control of the carrier or its servants, and furnished and applied by it, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care, and there is said to be a presumption of negligence sufficient to entitle plaintiff to go to the jury. The reasons of the rule are that the carrier is liable for the negligence of its employes as well as for its own, and that it or its servants being in the exclusive management and control of that which caused the injury, the injury is more naturally to be attributed to its own acts or omissions than to those of a stranger, and its means and sources of knowledge are superior to those of the plaintiff. Therefore, in the absence of an explanation showing by proof that the accident was caused by another, or by some other cause for which the carrier was not responsible, as the presence of *vis major* or the tortious act of a stranger, there is a presumption of negligence on its part.<sup>4</sup> The presumption of negligence thus arises where a pas-

N. Y. 158; *Wiedmer v. New York Elev. R. Co.*, 41 Hun (N. Y.), 284; *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236; 64 Am. Dec. 502, note; *Texas, etc., R. Co. v. Suggs*, 62 Tex. 323; *Piggott v. Eastern, etc., R. Co.*, 3 C. B. 229; *Dougherty v. Missouri R. Co.*, 81 Mo. 325, 21 Am. & Eng. R. Cas. 497, 51 Am. Rep. 239; *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551, 21 Am. & Eng. R. Cas. 466; *Kearney v. London, etc., R. Co.*, L. R. 5 Q. B. 411, 6 Q. B. 759; *Scott v. London, etc., Docks Co.*, 3 Hurl. & Colt. 596; *Robinson v. New York Cent. R. Co.*, 20 Blatchf. (U. S.) 338; *Mulcairns v. Janesville*, 67 Wis. 24. *Cleveland, etc., R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633: "There is no

presumption of negligence as against either party except such as arises from the facts proved. Indeed, the presumption of law is that neither party was guilty of negligence, and such presumption must prevail until overcome by proof."

4. *Jones v. Union Ry. Co.*, 18 App. Div. (N. Y.) 267; *Kaiser v. Latimer*, 40 App. Div. (N. Y.) 149, 57 N. Y. Supp. 833, but where the proof of negligence rests upon the plaintiff, a presumption of defendant's negligence arising from the facts, does not change the burden of proof; *Chicago Union Tract. Co. v. Crosby*, 109 Ill. App. 644; *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *White v. Boston, etc., R.*

senger is struck by objects projecting from trains passing on adjoining tracks, as where a passenger was struck upon the arm by a swing door on a passing freight train;<sup>5</sup> where he was struck with a heavy object projecting from a stationary car on an adjoining track;<sup>6</sup> and where he was struck with a bar of iron projecting from a construction train on an adjoining track.<sup>7</sup> The rule that a presumption of negligence on the part of a carrier arises when a passenger is injured in the course of transportation cannot be invoked, without evidence tending to connect the carrier or its employes, or some of the appliances of transportation with the happening of the injury. To throw the burden upon the carrier, it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation.<sup>8</sup>

The doctrine *res ipsa loquitur* has no general application to injuries resulting to a passenger. If, however, an injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, or by some defect in

Co., 144 Mass. 404, 11 N. E. 552; Hicks v. New York, etc., R. Co., 164 Mass. 424, 41 N. E. 721; Fitch v. Mason City, etc., Traet. Co. (Iowa), 100 N. W. 618; Howser v. Cumberland, etc., R. Co., 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154; Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859; Volkmar v. Manhattan R. Co., 134 N. Y. 418, 31 N. E. 870; Cummings v. National Furnace Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; Kirst v. Milwaukee, etc., R. Co., 46 Wis. 489, 1 N. W. 89; Iron R. Co. v. Mowrey, 36 Ohio St. 418, 38 Am. Rep. 597; Ryder v. Kinsey, 62 Minn. 85, 64 N. W. 94; Scott v. London Docks Co., 3 H. & C. 596; Carpue v. London, etc., R. Co., 5 Q.

B. 747; Kearney v. London, etc., R. Co., L. R. 6 Q. B. 759; Kinney v. London, etc., R. Co., L. R. 5 Q. B. 411; Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. 146, 29 L. R. A. 718; Allen v. Northern Pac. R. Co., 35 Wash. 221, 77 Pac. 204.

5. Breen v. New York Cent., etc., R. Co., 109 N. Y. 297. But see Hanson v. Lancashire, etc., R. Co., 20 W. R. 297.

6. Holbrook v. Utica, etc., R. Co., 12 N. Y. 236, 64 Am. Dec. 502.

7. Walker v. Erie R. Co., 63 Barb. (N. Y.) 260.

8. Ault v. Cowan, 20 Pa. Super. Ct. 616.

machinery, cars, or track, and the accident is of such a character as does not ordinarily occur if due care is used, the law comes to the aid of the passenger and raises a presumption of negligence.<sup>9</sup> The doctrine of *res ipsa loquitur* applies in an action against a carrier by a passenger only where the accident occurred in some manner which cannot be proved by the plaintiff—the true cause lying solely within the knowledge of the defendant—and where the accident was such a one as would not happen in the ordinary course of things under proper management. Under such circumstances, if the defendant offers no explanation of the accident, then want of care will be presumed, and, in the absence of satisfactory explanation, recovery may be had.<sup>10</sup> The sudden blazing

9. *O'Callaghan v. Dellwood Park Co.*, 242 Ill. 336, 89 N. E. 1005; *Castelano v. Chicago, etc., R. Co.*, 149 Ill. App. 250; *McFadden v. Chicago, etc., R. Co.*, 149 Ill. App. 298; *Barnes v. Danville St. Ry., etc., Co.*, 235 Ill. 556, 85 N. E. 921; *Illinois Cent. R. Co. v. Rothchild*, 134 Ill. App. 504; *Chicago Union Traction Co. v. Berkes*, 136 Ill. App. 105; *St. Louis St. Ry. Co. v. Homer* 137 Ill. App. 548. See *Asher v. East St. Louis & S. Ry. Co.*, 140 Ill. App. 220.

The mere happening of the accident did not raise an inference of negligence. *Losie v. Delaware & H. Co.*, 126 N. Y. Supp. 871, 142 App. Div. 214.

Where it did not appear how an accident to a passenger occurred, or what caused it, the doctrine *res ipsa loquitur* did not apply. *Adams v. St. Louis S. W. Ry. Co. of Texas* (Tex. Civ. App.), 137 S. W. 437.

10. *Sullivan v. Capital Traction Co.*, 34 App. D. C. 358; *Roanoke Ry., etc., Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385.

In an action by a passenger

against a carrier, where the plaintiff alleges in his declaration the specific facts upon which he relies to establish the negligence of the defendant—thus showing that they are within his knowledge—the burden is upon him to establish negligence as the basis for recovery; and he does not make out a *prima facie* case calling for rebuttal or explanation by the defendant by merely proving that he was a passenger and the occurrence of the accident by which he was injured. *Sullivan v. Capital Traction Co.*, *supra*.

*Contra.* A railroad company is presumed to have been negligent where a passenger is injured through an accident. *Norris v. St. Louis, etc., Ry. Co.*, 239 Mo. 695, 144 S. W. 783; *Partello v. Missouri Pac. Ry. Co.*, 240 Mo. 122, 145 S. W. 55; *Bunch v. Charleston & W. C. Ry. Co.*, 91 S. C. 139, 74 S. E. 363.

An accident not happening ordinarily without negligence raises a presumption of negligence. *Dorn v. Chicago, etc., Ry. Co.*, 154 Iowa, 140, 134 N. W. 855.



out of flame from the controller of a trolley car was of an unusual and unexpected character and such as to bring into application the doctrine *res ipsa loquitur* in an action for injuries to a passenger occasioned by the rush of the passengers to get off the car immediately after the occurrence, but that doctrine merely raises a presumption which presumption yields readily to evidence.<sup>11</sup> The mere fact of injury to a passenger while on his journey, without any evidence connecting the carrier with its cause, does not raise the presumption of negligence; but where the passenger establishes the relation of passenger and carrier, and indicates that his injury during transit resulted from a breach of a duty which the carrier owed pertaining to his safety, the presumption of negligence of the carrier arises, and it must, to defeat a recovery, explain it away.<sup>12</sup> A presumption of the carrier's negligence arises from the mere fact of an accident injuring a passenger, which is caused by some agency over which the carrier has control.<sup>13</sup> But there is no presumption of negligence of the carrier where nothing happened to the car on which plaintiff was riding, and there is no collision or breakage of anything.<sup>14</sup> Where a passenger suing for injuries pleaded general and specific acts of negligence, and the cause was tried on the theory that both specific and general negligence was alleged, the presumption of the carrier's negligence arose on proof of plaintiff's injury while a passenger.<sup>15</sup> While, in

11. *Garner v. Chicago Consol. Traction Co.*, 150 Ill. App. 149, holding also that the burden upon the defendant when plaintiff has made a case which entitles him to the application of the *res ipsa loquitur* doctrine is not satisfactorily to account for the occurrence, but merely to rebut the inference that it has failed to use due care.

12. *Rice v. Chicago, etc., Ry. Co.*, 153 Mo. App. 35, 131 S. W. 374.

There is no presumption of negligence on the part of a carrier from

the mere fact of the fall of an open window on the arm of a passenger. *Boucher v. Boston & M. R. Co.*, 76 N. H. 91, 79 Atl. 993, 34 L. R. A. (N. S.) 728.

13. *Emerson v. Butte Electric Ry. Co.* (Mont.), 129 Pac. 319; *John v. Northern Pac. Ry. Co.*, 42 Mont. 18, 111 Pac. 632.

14. *Levin v. Philadelphia & R. R. Co.*, 228 Pa. 266, 77 Atl. 456.

15. *Roberts v. Sierra Ry. Co. of Cal.*, 14 Cal. App. 180, 111 Pac. 519, rehearing denied, 111 Pac. 527.

a street car passenger's action for personal injuries, plaintiff may make out a *prima facie* case by showing the accident and resulting injury so as to raise a presumption of negligence, if negligence is alleged generally, where specific acts of negligence are alleged he must prove the acts relied upon; no presumption of negligence arising.<sup>16</sup> A passenger who proves an injury caused by some agency or instrumentality of the carrier makes out a *prima facie* case, and the law raises a presumption that the injury was caused by the carrier's negligence, and the burden is on it to overthrow the presumption by proving that the injury was accidental or due to other causes than its negligence.<sup>17</sup> The rule that proof that a passenger is injured casts on the carrier the burden of proving its freedom from negligence does not apply, where the passenger's evidence shows that his injury resulted probably from some unavoidable cause and some cause outside the control of the carrier; the burden being on the carrier to reasonably satisfy the jury that his injury is justly attributable to the carrier's negligence.<sup>18</sup> The mere fact that a passenger is injured while alighting from a car is not sufficient to charge the carrier with liability.<sup>19</sup> Where a passenger on a street car fell on the floor and was injured, no presumption of negligence arose; there being no evidence to show that the carrier was responsible for the fall.<sup>20</sup> Where there was evidence only that a train came in fast at a station where plaintiff, with other passengers, was waiting on the station platform for its arrival, no inference could be drawn that the engineer was negli-

16. *Detrich v. Metropolitan St. Ry. Co.*, 143 Mo. App. 176, 127 S. W. 603; *Potter v. Metropolitan St. Ry. Co.*, 142 Mo. App. 220, 126 S. W. 209.

17. *Sullivan v. Charleston & W. C. Ry. Co.*, 85 S. C. 532, 67 S. E. 905; *Shelton v. Southern Ry. Co.*, 86 S. C. 98, 67 S. E. 899; *Williford v. Southern Ry. Co.*, 85 S. C. 301, 67 S. E. 302; *McKittrick v. Greenville Trac-*

*tion Co.*, 88 S. C. 91, 70 S. E. 414; *Brown v. Atlantic Coast Line R. Co.*, 83 S. C. 53, 64 S. E. 1012; *Anderson v. South Carolina & G. R. Co.*, 77 S. C. 434, 58 S. E. 149.

18. *Central of Ga. Ry. Co. v. Brown*, 165 Ala. 493, 51 So. 565.

19. *Knuekey v. Butte Electric Ry. Co.*, 41 Mont. 314, 109 Pac. 979.

20. *Rhea v. Minneapolis St. Ry. Co.*, 111 Minn. 271, 126 N. W. 823.

gently running at such an excessive or unusual speed as to endanger the plaintiff.<sup>21</sup> In the absence of a statute making proof of death or injury *prima facie* evidence of negligence on the part of a carrier, proof of the injury alone will not sustain a recovery.<sup>22</sup> That a passenger was injured while alighting at a station by stepping on a small, loose bolt, without any showing as to how it came there or how long it had been there, raises no presumption of negligence.<sup>23</sup>

Where a passenger, while standing on a station platform waiting for his train, was struck and injured by a mail sack thrown from a swiftly passing train, it would be presumed that the injury resulted from the carrier's negligence.<sup>24</sup> Plaintiff having shown an injury caused by the wreck of defendant's train while he was a passenger thereon, or at least having offered evidence which made it necessary to consider his injury under such circumstances as one hypothesis of the case, that hypothesis proven cast upon the defendant the burden of reasonably satisfying the jury that the wreck was not due to its negligence.<sup>25</sup> A showing that plaintiff's intestate was injured by the operation of a train, which she was then attempting to board as a passenger, made out a *prima facie* case of negligence so as to place the burden upon the company of negating negligence.<sup>26</sup> A showing that a passenger was killed by a train under the carrier's management and control casts the burden upon it to negative the presumption that it was negligence.<sup>27</sup> That a train failed to stop at a flag station to which a passenger had paid his fare, resulting in his injury, is evidence of the carrier's negligence;<sup>28</sup> but negligence of the carrier will not

21. *Savageau v. Boston & M. R. Co.*, 210 Mass. 164, 96 N. E. 67.

22. *Wright v. Sioux Falls Traction System*, 28 S. D. 378, 133 N. W. 696.

23. *Serviss v. Ann Arbor R. Co.*, 169 Mich. 564, 135 N. W. 343.

24. *Huddleston v. St. Louis, etc., Ry. Co.*, 90 Ark. 378, 119 S. W. 230.

25. *St. Louis & S. F. R. Co. v. Savage*, 163 Ala. 55, 50 So. 113.

26. *Miles v. St. Louis, etc., R. Co.*, 90 Ark. 485, 119 S. W. 837.

27. *Dieckman v. Chicago & N. W. Ry. Co.*, 145 Iowa, 250, 121 N. W. 676, revg. judg. 105 N. W. 526.

28. *Davis v. Atlanta & C. Air Line Ry. Co.*, 83 S. C. 66, 64 S. E. 1015.

be presumed where a prospective passenger went to a flag station at night and endeavored to stop the train by a flaming torch, the train having passed and injured him before he could escape, and the operatives being in ignorance of his presence or intention until after he was injured.<sup>29</sup> The rule *res ipsa loquitur* applies to the operation of street cars and to all passengers alike whether injured while riding in a car or in getting on or off.<sup>30</sup> On mere proof of an injury to a passenger, his *prima facie* right of recovery, under counts charging simple negligence is established.<sup>31</sup> Where a passenger while in the exercise of ordinary care is injured, and the cause of the injury is within the control of the carrier, a presumption of negligence arises against the carrier, and a *prima facie* case is made out entitling the passenger to recover until the *prima facie* case is rebutted.<sup>32</sup> A complaint, in an action for injuries to a passenger on an electric railway, alleging that defendant so negligently operated the car on which plaintiff was a passenger and other cars that plaintiff's car was struck by another car, and

29. *Bruff v. Illinois Cent. R. Co.* (Ky.), 121 S. W. 475.

30. *Paul v. Salt Lake City R. Co.*, 34 Utah, 1, 95 Pac. 363.

Where the evidence showed that plaintiff was injured in an accident while a passenger on a street car, plaintiff was entitled to invoke the doctrine *res ipsa loquitur*. *Meschneck v. Brooklyn, etc., R. Co.*, 109 N. Y. Supp. 594, 125 App. Div. 265; *Schneider v. Brooklyn Heights R. Co.*, 109 N. Y. Supp. 595, 125 App. Div. 911.

In an action for injuries to plaintiff while a passenger on an S. avenue car when on a bridge, it will not be presumed, in the absence of proof, that the defendant had exclusive possession of the tracks over the bridge. *Id.*

Where a little girl walked to the

rear platform, and the conductor rang the bell for the next crossing, and the car slowed down and ran into a turnout, and by reason of the motion caused by entering the turnout the child fell from the platform, no inference arose that the accident occurred by negligence in handling the car. *Pascell v. North Jersey St. Ry. Co.*, 75 N. J. L. 836, 69 Atl. 171.

31. *Birmingham Ry. etc., Co. v. Sawyer*, 156 Ala. 199, 47 So. 67.

32. *Elgin, etc., Traction Co. v. Hench*, 132 Ill. App. 535; *Southern Ry. Co. in Ky. v. Brewer*, 32 Ky. Law Rep. 1374, 108 S. W. 936.

In an action by a passenger for personal injuries, it rests on plaintiff to establish both the injury and the negligence which caused it. *Casper v. New Orleans Ry., etc., Co.*, 121 La. 603, 46 So. 666.

that defendant could, by care, have prevented the collision, does not rely on any particular act of negligence, and hence the rule that, where the complaint does not rely on the general presumption of negligence arising from the happening of the collision, but charges specific acts, such presumption does not arise, is without application.<sup>33</sup> Where a man in a crowded car gives a woman his place, and stands on the front platform and is injured, he forfeits the advantage of the presumption that the accident resulted from the negligence of the company.<sup>34</sup> Where injury to a passenger is caused by an injury to the vehicle or by an obstruction, collision, derailment, etc., a *prima facie* presumption of negligence arises from the fact of the accident, but not so if the injury is to the passenger while about the carrier's premises, and not to the vehicle, etc.<sup>35</sup> While a presumption of negligence arises from proof of injury to a passenger, through any agency or instrumentality of the carrier, there is no presumption of willfulness or wantonness from that fact.<sup>36</sup> An allegation in the complaint that the injury was caused through the carelessness and negligence of the agents, servants, and employes of the corporate defendant is a sufficiently general charge of negligence to render the doctrine *res ipsa loquitur* available.<sup>37</sup>

33. *Jordan v. Seattle, etc., Ry. Co.*, 47 Wash. 503, 92 Pac. 284. See also, *Walters v. Seattle, etc., Ry. Co.*, 48 Wash. 233, 93 Pac. 419.

Proof that plaintiff was a passenger upon a car of defendant, that she was in her seat and that while there she was struck by another car of defendant and injured, makes a *prima facie* case. *Chicago City Ry. Co. v. Rural*, 127 Ill. App. 652, judg. affd. 224 Ill. 324, 79 N. E. 686.

34. *Paterson v. Philadelphia Rap. Transit Co.*, 218 Pa. 359, 67 Atl. 616.

35. *Western Ry. of Alabama v. McGraw (Ala.)*, 62 So. 772; *Louisville & N. R. Co. v. Godwin (Ala.)*, 62 So. 768.

36. *Moore v. Greenville Traction Co. (S. C.)*, 77 S. E. 928.

37. *Erdmann v. United Rys. of St. Louis (Mo. App.)*, 155 S. W. 1081. See, generally, as to Presumptions of Fact and Presumptions of Law, the very late, exhaustive work, Chamberlayne on "The Modern Law of Evidence," Vol. 2, Chaps. 13 and 14.

## § 2. Acts of servants or defects in instrumentalities of transportation.

The rule that proof of the occurrence of an accident causing injury to a passenger arising from any disarrangement or displacement of the track or car of a railroad company, operated by electricity, steam, cable power, or otherwise, or from a defect in any of those things which the carrier is bound to supply, is in itself presumptive evidence of the negligence of the carrier, is generally held, except that in certain jurisdictions proof is also required on the part of the passenger that the accident occurred without fault on his part.<sup>38</sup> Such proof being made casts the bur-

38. *Bosqui v. Sutro R. Co.*, 63 Pac. 682, 131 Cal. 390; *Hastings v. Central, etc., R. Co.*, 40 N. Y. Supp. 93; *Brimmer v. Illinois Cent. R. Co.*, 101 Ill. App. 198; *Davis v. Paducah Ry. & Light Co.*, 24 Ky. Law Rep. 135, 68 S. W. 140; *Cleveland City Ry. Co. v. Osborn*, 66 Ohio St. 45, 63 N. E. 604; *Clow v. Pittsburgh Tract. Co.*, 158 Pa. 410, 27 Atl. 1004; *Elgin City R. Co. v. Wilson*, 56 Ill. App. 364; *Curtis v. Rochester & Syracuse R. Co.*, 18 N. Y. 534; *Bowen v. New York Cent. R. Co.*, 18 N. Y. 408; *Adam v. Union Ry. Co.*, 80 N. Y. Supp. 264.

Where a car is started with great violence it is a fair inference that such violence could not have been the result of anything else than the improper application of the power to move the car, and negligence on the part of the railway company. *Grotsch v. Steinway R. Co.*, 19 App. Div. (N. Y.) 130, 45 N. Y. Supp. 1075. See *Jonas v. Long Island R. Co.*, 47 N. Y. Supp. 149, 21 Misc. Rep. (N. Y.) 306; *Ferry v. Manhattan R. Co.*, 118 N. Y. 497, 29 N. Y. St. Rep. 933;

*Martin v. Second Ave. R. Co.*, 3 App. (N. Y.) 448, 38 N. Y. Supp. 220.

A presumption of negligence arises:

Conductor violently striking passenger in the face.—*Kohner v. Capital Traction Co.*, 22 App. D. C. 181, 62 L. R. A. 875.

Passenger injured in fight between drunken passengers.—*Pittsburg, etc., R. Co. v. Pillow*, 76 Pa. St. 510.

Gate on rear platform of street car swung open while the car was in motion.—*Aston v. St. Louis Transit Mo. (Mo. App.)*, 79 S. W. 999.

Train parting while in transit.—*Feldschneider v. Chicago, etc., R. Co. (Wis.)*, 99 N. W. 1034.

Escape of electricity in car.—*D'Arcy v. Westchester Elec. R. Co.*, 82 App. Div. (N. Y.) 263, 81 N. Y. Supp. 952.

Sudden stopping of a train, or cable or street car.—*Chicago Union Tract. Co. v. Mommsen*, 107 Ill. App. 353; *Wylde v. Northern R. Co.*, 14 Abb. Pr. N. S. (N. Y.) 213; *Clow v. Pittsburgh Tract. Co.*, 158 Pa. St. 410.

Overheating of plate over a wheel.

den on the defendant to show that it and its agents were without

—Powell v. Hudson Valley R. Co., 88 App. Div. (N. Y.) 133, 84 N. Y. Supp. 337.

**Passenger struck by mail pouch suspended at side of track.**—McCord v. Atlanta, etc., Air Line R. Co. (N. C.), 45 S. E. 1031.

**Passenger jumping from car because of well-grounded fear of collision.**—Palmer v. Warren St. R. Co., 206 Pa. 574, 56 Atl. 9, 63 L. R. A. 507.

**Sudden stopping of horses and inability to apply the brake.**—Noval v. Brooklyn City R. Co., 87 N. Y. 63.

**Sudden and unexpected release of a brake.**—Gilmore v. Brooklyn Heights R. Co., 6 App. Div. (N. Y.) 117, 39 N. Y. Supp. 417.

**Sudden starting of car while passenger is alighting.**—United Rys., etc., Co. v. Beidleman (Md.), 52 Atl. 913; Consolidated Tract. Co. v. Thalheimer, 59 N. J. L. 474, 37 Atl. 132; Scott v. Bergen Co. Tract. Co. (N. J.), 43 Atl. 1060, 4 Chic. L. J. Wkly. 79; North Chicago St. R. Co. v. Schwartz, 82 Ill. App. 493; Armstrong v. Metropolitan St. R. Co., 23 App. Div. (N. Y.) 137, 48 N. Y. Supp. 597; Roberts v. Johnson, 58 N. Y. 613; Murphy v. St. Louis, etc., R. Co., 43 Mo. App. 342; Continental Pass. R. Co. v. Swain, 13 W. N. C. (Pa.) 41. But see Brown v. Congress St., etc., R. Co., 49 Mich. 153.

**Handrail charged with electricity.**—Dallas Consol. St. Elec. R. Co. v. Broadhurst (Tex.), 68 S. W. 315.

**Passenger injured by escaping elec-**

**tricity.**—Eickhof v. Chicago, etc., R. Co., 77 Ill. App. 196; Denver Tramway Co. v. Reid, 4 Am. Electl. Cas. 332, 4 Colo. App. 53, 35 Pac. 269; Burt v. Douglas Co. St. R. Co., 83 Wis. 229, 18 L. R. A. 479.

**Passenger thrown from car by sudden lurch of moving train.**—Murphy v. Coney Island, etc., R. Co., 36 Hun (N. Y.), 199; Lavis v. Wisconsin Cent. R. Co., 54 Ill. App. 636; Condry v. St. Louis, etc., R. Co., 85 Mo. 79; Dougherty v. Missouri R. Co., 81 Mo. 325, 51 Am. Rep. 239.

**Act of servant.**—Memphis, etc., Packet Co. v. McCool, 83 Ind. 392, 43 Am. Rep. 71; Murphy v. Atlanta, etc., R. Co., 89 Ga. 832, suddenly opening a closed door.

**Violent jolt or jar from coupling cars or otherwise.**—Cook v. Long Island R. Co., 19 N. Y. Supp. 648; Georgia Pac. R. Co. v. Love, 91 Ala. 432; Gardner v. Weyeross Air Line R. Co., 97 Ga. 482. But see Herstine v. Lehigh Valley R. Co., 151 Pa. St. 244.

**Falling of baggage.**—Horowitz v. Hamburg-American Packet Co., 18 Misc. Rep. (N. Y.) 24.

**Falling of merchandise piled on boat.**—Memphis, etc., Packet Co. v. McCool, 83 Ind. 392, 43 Am. Rep. 71.

**Falling of ventilator window.**—Och v. Missouri, etc., R. Co., 130 Mo. 37. But see Murray v. Metropolitan Dist. R. Co., 27 L. T. N. S. 762.

**Falling of lamp shade.**—White v. Boston, etc., R. Co., 144 Mass. 404.

**Kicking of passenger by horse.**—Budd v. United Carriage Co., 25 Or. 314.

fault.<sup>39</sup> For instance, when plaintiff, who was a passenger, was injured by the sudden and unexplained stopping of defendant's street car, and on the trial introduced proof of such occurrence, and rested; defendant then produced four of its employes, who testified to the use of the best known appliances, careful supervision, and skillful service; the court held that a dismissal of plaintiff's complaint was error, since under the doctrine of *res ipsa loquitur* proof of the accident cast the burden of explanation on the defendant.<sup>40</sup> In a case where it was shown that an injury to a passenger was caused by an act of the carrier in operating

**Dress catching on broken curtain hook.**—Kelley v. New York, etc., R. Co., 109 N. Y. 44.

**Overturning of stage coach or carriage.**—Stokes v. Saltonstall, 38 U. S. (13 Pet.) 192; McKinney v. Neil, 1 McLean (U. S.), 540; Bush v. Bennett, 96 Cal. 202, 31 Pac. 2; Lawrence v. Green, 70 Cal. 417, 11 Pac. 750, 59 Am. Rep. 428; Boyce v. California Stage Co., 25 Cal. 460; Fairchild v. California Stage Co., 13 Cal. 599; Wall v. Livezey, 6 Colo. 465; Payne v. Halstead, 44 Ill. App. 97; Anderson v. Scholey, 114 Ind. 553, 17 N. E. 125; Stockton v. Frey, 4 Gill (Md.), 406, 45 Am. Dec. 138; Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Ryan v. Gilmer, 2 Mont. 517, 25 Am. Rep. 744, 4 Ky. Law Rep. 151; Tennery v. Pippinger, 1 Phila. (Pa.) 543; McCall v. Foreyth, 4 W. & S. (Pa.) 179; Farish v. Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

39. Texas & P. R. Co. v. Gardner (Tex.), 114 Fed. 186; Calumet Elec. St. Ry. Co. v. Jennings, 83 Ill. App. 612; McCurrie v. Southern Pac. Co., 122 Cal. 561, 55 Pac. 324; Bassett v. Los Angeles Tract. Co. (Cal.), 22

Am. & Eng. R. Cas. N. S. 5, 65 Pac. 470; Olsen v. Citizens' Ry. Co., 152 Mo. 426, 54 S. W. 470; Clark v. Railroad Co., 127 Mo. 210, 29 S. W. 1016; Hill v. Ninth Ave. R. Co., 109 N. Y. 239, 16 N. E. 61; Smedley v. Hestonville, etc., R. Co., 184 Pa. St. 620, 39 Atl. 544, 9 Am. & Eng. R. Cas. N. S. 649; Steele v. Consolidated Tract. Co., 30 Pittsb. (Pa.) L. J. N. S. 290; Scott v. Bergen Co. Tract. Co., 63 N. J. L. 407, 43 Atl. 1060, 48 Atl. 1118.

40. Langley v. Metropolitan St. Ry. Co., 74 N. Y. Supp. 857, 36 Misc. Rep. (N. Y.) 804. But see Hoffman v. Third Ave. R. R. Co., 45 App. Div. (N. Y.) 586, 61 N. Y. Supp. 590, holding that the fact that a street car, when going through a crowded street, at a rate faster than a person can walk, comes to a stop suddenly, without any act of the gripman, does not of itself give rise to a presumption of negligence on the part of the car company, though a passenger is injured by falling from her seat, in consequence of the sudden stopping; also Black v. Third Ave. R. Co., 2 App. Div. (N. Y.) 629; Nelson v. Lehigh Val. R. R. Co., 25 Id. 535.



the instrumentalities employed in its business, it was held that there was a presumption of negligence, which threw on the carrier the burden of showing that the injury was sustained without negligence on its part; and hence a verdict for injuries against a street railroad would not be reversed, because the evidence failed to show that the rate of speed of the car at the time of the accident was excessive, or that the excessive rate of speed or other negligence of defendant was the proximate cause of the injury, since it was sufficient that the evidence failed to show that it was not so.<sup>41</sup> But to enable a passenger to recover for injuries from a street railway company operating its cars by cable, it is not enough to show that there was a jerk in the cable which threw the plaintiff from the car, but it must affirmatively appear that the jerk was an extraordinary or unusual one, or attributable to a defect in the track, an imperfection in the car or apparatus, or to a dangerous rate of speed, or to unskillful handling of the car by the gripman.<sup>42</sup>

Where the conductor of a car on which plaintiff was riding gave a signal for an emergency stop, whereupon the motorman applied the brakes so suddenly that his hand slipped through the glass of the front door, some of which fell on plaintiff and injured him, and defendants did not show the reason for the signal, it was held that since, without further explanation, the slipping of the motorman's hand from the brake was presumably negligent, there was no refutation of the presumption of negligence by the proof of the giving of the emergency signal, and, having failed to show

41. *Bassett v. Los Angeles Tract. Co.*, 133 Cal. 1, 65 Pac. 470, 22 Am. & Eng. R. Cas. N. S. 5.

42. *Bartley v. Metropolitan St. R. Co.*, 148 Mo. 124, 5 Am. Neg. Rep. 635, 49 S. W. 840. See also *Hayes v. Forty-second, etc., St. R. Co.*, 97 N. Y. 259; *Muller v. Second Ave R. Co.*, 16 J. & S. (N. Y.) 546; *Holland v. West End. St. R. Co.*, 155 Mass. 357; *Baltimore, etc., R. Co. v.*

*Cason*, 72 Md. 377; *Barth v. Houghton Co. St. R. Co.* (Mich.), 93 N. W. 620, 9 Det. Leg. News, 595; *Adams v. Washington, etc., R. Co.*, 9 App. D. C. 34, 24 Wash. L. Rep. 634; *Metropolitan R. Co. v. Snashall*, 3 App. D. C. 420; *Stager v. Ridge Ave. Pass. R. Co.*, 119 Pa. St. 70; *Denver, etc., R. Co. v. Fotheringham* (Colo.), 68 Pac. 978.

the necessity therefor, the presumption that defendant was negligent was unaffected.<sup>43</sup> The running of a freight train with a car the door of which is in such a damaged condition as to be a menace to the safety of passengers in a passenger train running in the opposite direction is evidence of negligence under the doctrine *res ipsa loquitur*, and requires the carrier, in order to be relieved from the charge of negligence resulting in injury to a passenger, to excuse the condition of the car.<sup>44</sup>

### § 3. Breaking of machinery or instrumentalities, and defects therein.

The doctrine *res ipsa loquitur* is applicable where a manila rope used in the operation of an inclined railway broke, the safety appliance did not work, the device on the car did not hold it and also broke, and the car fell to the bottom of the incline.<sup>45</sup> That a mixed train on which plaintiff was riding as a passenger had broken in two, and that the collision of the parted sections caused injury to plaintiff, raised a presumption of negligence.<sup>46</sup> Where a passenger, approaching an elevated railroad platform in order to gain it, pressed his hand against the glass of a locked door with sufficient force to break it, such facts were insufficient to raise a presumption that the door was improper for the purposes for which it was constructed, or that the breakage arose from any defects in the glass or door, under the doctrine *res ipsa loquitur*.<sup>47</sup> In an action for injuries received by a passenger, caused by the breaking of an axle under the tender, and the partial derailing of

43. *Brumberger v. Joline*, 125 N. Y. Supp. 519.

44. *Kuttner v. Central R. Co. of N. J.*, 80 N. J. Law, 11, 77 Atl. 470, judg. affd. 81 N. J. Law, 731, 80 Atl. 1135.

45. *Burke v. State*, 119 N. Y. Supp. 1089, 64 Misc. Rep. 558 (Ct. Cl.).

46. *Reeves v. Chicago, etc., Co.*, 24 S. D. 84, 123 N. W. 498.

47. *McCormack v. Interborough Rap. Transit Co.*, 117 N. Y. Supp. 532, 132 App. Div. 703, revg. judg. 113 N. Y. Supp. 1006, 61 Misc. Rep. 601.

the coach in which plaintiff was riding, it will be presumed that the accident was caused by the negligence of the carrier, and the burden of proof is on the carrier to rebut such presumption.<sup>48</sup> No presumption of want of due care of a carrier arises from the fact that it has constructed its station platform in such a way, presumably to meet the requirements of the traffic, that one portion of it is lower than another, when the difference of level is not greater than the height of an ordinary step.<sup>49</sup> A presumption of negligence arises where the injury resulted to one about to board a street car by reason of the fender of the car about to be boarded becoming detached and thrown so as to strike and injure such person.<sup>50</sup> Where a passenger raised a window sash with due care until it was latched, and it fell through a defective condition of the catch, and injured her, the case is within the rule that a passenger injured without his fault by a defective appliance of the carrier is *prima facie* entitled to recover.<sup>51</sup> Where a passenger proved his injury as a result of a breakage in one of the cars of a train in which he was riding, the carrier, in order to defeat a recovery, must show, not only that it was due to a cause or causes which the exercise of the utmost human skill and foresight could not prevent, but that, if the accident was due to a latent defect in the material or construction of the car, it could not have been discovered either by the carrier or the builders by the exercise of such care.<sup>52</sup> Where a passenger on a crowded street car was injured by the trolley pole slipping from the wire, negligence could not be inferred from such an occurrence, and no recovery could be had in the absence of some additional proof that the slipping of the pole from the wire was due to some negligent act of the car-

48. *Pate v. Columbia & P. S. R. Co.*, 52 Wash. 166, 100 Pac. 324.

49. *Feil v. West Jersey & S. R. Co.*, 77 N. J. Law, 502, 72 Atl. 362.

50. *McDonnell v. Chicago City Ry. Co.*, 131 Ill. App. 227.

51. *Cleveland, etc., Ry. Co. v. Hadley*, 170 Ind. 204, 82 N. E. 1025, rehearing denied 84 N. E. 13.

52. *Morgan v. Chesapeake & O. Ry. Co.*, 32 Ky. Law Rep. 330, 105 S. W. 961.

rier.<sup>53</sup> In an action for injuries to a passenger on a street car, though the burden of proof on the whole case was on the plaintiff, her showing that the injury was caused by the flying up of a trap-door in the floor of the car placed on defendant the necessity for explaining the happening to free itself from the presumption of negligence.<sup>54</sup> Where the engine and water car were uncoupled from defendant's train, and a flying switch made with the water car, which became uncontrollable because of the breaking of the brake chain, and the car on that account collided with a passenger coach, causing plaintiff's injuries, there arose, in conformity with the maxim *res ipsa loquitur*, a *prima facie* presumption that the accident was due to the negligence of the defendant or its servants.<sup>55</sup> Where plaintiff, a passenger on a street car, claimed that she was injured while attempting to alight because of the defective condition of a step of the car, she was bound to show that she was injured while in the exercise of due care, and that the defective step was the proximate cause of her injury.<sup>56</sup> A passenger showing the breaking of a coupling in a train, and the parting thereof and his consequent injury, proves a *prima facie* case, requiring the railroad in order to be relieved from liability, to show the exercise of the highest degree of care to secure the safety of the passengers.<sup>57</sup> The collapse of a trap door forming a part of the floor of a street car, under the weight of a passenger who was simply walking thereon, resulting in injury to her, was evidence of negligence under the doctrine *res ipsa loquitur*.<sup>58</sup> Where a

53. *Feldheim v. Brooklyn, etc., R. Co.*, 107 N. Y. Supp. 413, 122 App. Div. 883.

54. *Baum v. New York & Q. C. Ry. Co.*, 108 N. Y. Supp. 265, 124 App. Div. 12.

55. *Dearden v. San Pedro, etc., R. Co.*, 33 Utah, 147, 93 Pac. 271.

56. *Smithers v. Wilmington City Ry. Co.*, 6 Pen. (Del.) 422, 67 Atl. 167.

**Ice on car steps.**—No presumption of negligence arises because of a thin layer of ice on the steps of a car. *Sutton v. Pennsylvania R. Co.*, 230 Pa. 523, 79 Atl. 719.

57. *Galveston, etc., Ry. Co. v. Young* (Tex. Civ. App.) 100 S. W. 993.

58. *Jordan v. St. Louis & M. R. R. Co.*, 122 Mo. App. 330, 99 S. W. 492.

passenger was injured while alighting from a car; her dress caught while she was alighting from the front platform so firmly that some one pulled her toward the car to loosen her dress; there were five persons on the platform at the time she alighted; it was held insufficient as a matter of law, notwithstanding the doctrine *res ipsa loquitur*, to show negligence on the theory that the platform was defective.<sup>59</sup> Proof of injury to a passenger, by the heel of her shoe catching on a piece of metal projecting from the step of the street car, makes a *prima facie* case of negligence, putting on the carrier the burden of disproving it.<sup>60</sup> In an action for injuries to a passenger caused by the sudden closing of the car door on his hand, any presumption of negligence arising from the accident, was overcome by the uncontradicted evidence that the catch provided for the car door was in good repair, and that the train was not operated at a dangerous rate of speed, and hence a verdict was properly directed in favor of defendant.<sup>61</sup> Where a passenger fell from the platform of a street car and was killed in consequence of the gate not being securely fastened, the question being as to whether the gate had been insecurely latched or was unlatched by the passenger himself, the burden of proof is on the carrier.<sup>62</sup>

That while a train was standing still, and after a passenger had passed through a car door to alight, and while her hand was resting on the door jamb, the door closed, injuring her hand, does not show *prima facie* negligence of the carrier; it not appearing that the door had been placed back so as to come in contact with the catch and that the catch was defective.<sup>63</sup>

59. *Thomas v. Boston Elevated Ry.*, 193 Mass. 438, 79 N. E. 749.

60. *Rattan v. Central Electric Ry. Co.*, 120 Mo. App. 270, 96 S. W. 735.

61. *Goss v. Northern Pac. Ry. Co.*, 48 Or. 439, 87 Pac. 149.

62. *Spurlock v. Shreveport Traction Co.*, 118 La. 1, 42 So. 575.

63. *Christensen v. Oregon Short*

*Line R. Co.*, 35 Utah, 137, 99 Pac. 676.

Any inference that a car door catch was defective, arising from the fact that the door closed on a passenger's hand, was overcome by the conductor's testimony that the catch was in perfect order. *Id.*

## § 4. Presumption arising from collisions.

The presumption of negligence on the part of the carrier has been generally held to arise in cases of collisions between trains or cars, whether operated by the same or different carriers, and in cases of collisions of trains or cars with some obstruction on or near the track.<sup>64</sup>

**64. Collision with other trains.**—*N. Y.*—*Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Bowles v. Rome, etc., R. Co.*, 46 Hun (N. Y.), 324.

*U. S.*—*Kansas City, etc., R. Co. v. Stoner*, 49 Fed. 209; *New Jersey R. Co. v. Pollard*, 22 Wall. (U. S.) 341.

*Ala.*—*Georgia Pac. R. Co. v. Love*, 91 Ala. 432.

*Ill.*—*Chicago City R. Co. v. Engel*, 35 Ill. App. 490.

*Ind.*—*Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126.

*Iowa.*—*Tuttle v. Chicago, etc., R. Co.*, 48 Iowa, 236.

*Minn.*—*Graham v. Burlington, etc., R. Co.*, 39 Minn. 84.

*Miss.*—*New Orleans, etc., R. Co., v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98.

*Mo.*—*Clark v. Chicago, etc., R. Co.*, 127 Mo. 197; *Magoffin v. Missouri Pac. R. Co.*, 102 Mo. 540; *Wilkerson v. Corrigan Consol. St. R. Co.*, 26 Mo. App. 144.

*Ohio.*—*Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597.

*Pa.*—*Rowdin v. Pennsylvania R. Co.*, 208 Pa. 623, 57 Atl. 1125.

**Collision between street cars.**—*Loudon v. Eighth Ave. R. Co.*, 162 N. Y. 380; *Falke v. Second Ave. R. Co.*, 38 App. Div. (N. Y.) 49, 55 N. Y. Supp. 984; *Kay v. Metropoli-*

*tan St. R. Co.*, 29 App. Div. (N. Y.) 466, 51 N. Y. Supp. 724; *Anderson v. Brooklyn Heights R. Co.*, 32 App. Div. (N. Y.) 266, 52 N. Y. Supp. 984; *Savage v. Marlborough St. R. Co.*, 186 Mass. 203, 71 N. E. 531; *Magrane v. St. Louis, etc., R. Co.*, 183 Mo. 119, 81 S. W. 1158; *Robinson v. St. Louis, etc., R. Co.* (Mo. App.) 77 S. W. 493; *Palmer v. Warren St. R. Co.*, 206 Pa. 574, 63 L. R. A. 507; *North Baltimore Pass. R. Co. v. Kaskell (Md.)*, 28 Atl. 410; *North Chicago St. R. Co. v. Cotton*, 140 Ill. 486; *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 50 Am. Rep. 550; *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334; *Miller v. St. Louis, etc., R. Co.*, 5 Mo. App. 471; *Clow v. Pittsburgh Tract. Co.*, 158 Pa. St. 410.

**Collision between street car and wagon.**—*Shay v. Camden, etc., R. Co.* (N. J.), 49 Atl. 547; *Hill v. Ninth Ave. R. Co.*, 109 N. Y. 239. But see *Potts v. Chicago City R. Co.*, 33 Fed. 610; *North Side St. R. Co. v. Want* (Tex. App.), 15 S. W. 40; *Quinlan v. Sixth Ave. R. Co.*, 4 Daly (N. Y.), 488, where a runaway team struck a street car.

**Collision between railroad train and street car.**—*Central Pass. R. Co. v. Kuhn*, 86 Ky. 578, 9 Am. St. Rep. 309.

**Steamboat colliding with wharf.**—

Where the car in which a passenger was riding was run into by an engine approaching from the rear, the facts of the accident establish a *prima facie* case of negligence on the part of the carrier.<sup>65</sup> The fact of a collision between two trains or street cars of a carrier of passengers resulting in injury to a passenger raises a presumption of negligence on its part which it must overcome.<sup>66</sup> That a collision between trains of a carrier occurred is *prima facie* evidence of negligence, as respects a passenger injured thereby.<sup>67</sup>

Proof that a street car proceeded rapidly, and that its speed was not checked until after a collision with a vehicle, resulting in injury to a passenger, was sufficient to call on the company for an explanation, and, in the absence of any explanation, warranted an inference that the operator of the car was negligent.<sup>68</sup>

A passenger injured need only prove that the injury was caused by a collision, derailing or upsetting of coaches, breaking of machinery or appliances, etc., or through some act of the employees operating the machinery or appliances, or in the management of the instrumentalities or the means used in the business, over which the carrier has control and for the conduct and management of which he is responsible; but the inference of negligence drawn from the injury is merely one way of establishing negligence, and the rule is not applicable to all injuries of passengers.<sup>69</sup>

*Bartlett v. New York, etc., Ferry etc., Co.*, 57 N. Y. Super. Ct. 48.

**Collision with animal on track.**—

*Bowen v. New York Cent. R. Co.*, 18 N. Y. 408, 72 Am. Dec. 529; *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462; *Louisville, etc., R. Co. v. Ritter*, 85 Ky. 368; *Sullivan v. Philadelphia, etc., R. Co.*, 30 Pa. St. 234, 72 Am. Dec. 698; *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277, 47 Am. St. Rep. 103; *Fordyce v. Jackson*, 56 Ark. 594.

**Collision between vessels.**—*Sherlock v. Alling*, 44 Ind. 184.

<sup>65.</sup> *Kirkendall v. Union Pac. R. Co.*, 200 Fed. 197, 118 C. C. A. 383.

<sup>66.</sup> *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 Pac. 322; *Meegan v. Metropolitan St. Ry. Co.*, 161 Mo. App. 45, 142 S. W. 1104; *Indiana Union Traction Co. v. Maher*, 176 Ind. 289, 95 N. E. 1012.

<sup>67.</sup> *Harris v. Puget Sound Electric Ry.*, 52 Wash. 289, 100 Pac. 838.

<sup>68.</sup> *Vogel v. Union Ry. Co. of New York City*, 130 App. Div. 732, 115 N. Y. Supp. 284.

<sup>69.</sup> *Christensen v. Oregon Short Line R. Co.*, 35 Utah. 137, 99 Pac. 676, 20 L. R. A. (N. S.) 255.

If a collision occurs between two traction trains, the doctrine *res ipsa loquitur* applies, in an action by a passenger for injuries, if both of such trains are controlled by defendant.<sup>70</sup> But no presumption arises against the carrier, and the burden is on the plaintiff to show negligence, when it is proven that the accident resulted from a collision with a car beyond the control of the defendant carrier.<sup>71</sup> Where a passenger has shown that his injury was the result of a collision, or other accident to the train a *prima facie* case is made.<sup>72</sup> A plaintiff in an action against a carrier for injuries sustained while a passenger, made out a *prima facie* case of negligence by proof that he was a passenger on one of the carrier's cars which collided with another of its cars, causing the injury complained of.<sup>73</sup> Where a passenger was injured as the result of

70. *Wojczynska v. Chicago Consol. Traction Co.*, 156 Ill. App. 587.

Where the petition in an action against a railroad company for personal injuries to a passenger alleges that he was injured while riding in a caboose of defendant's train by another of defendant's freight trains running into the caboose by reason of the negligent acts of the employes in charge of each of defendant's trains, the doctrine of *res ipsa loquitur* does not apply. *Ft. Worth & R. G. Ry. Co. v. Neal* (Tex. Civ. App.), 140 S. W. 398.

71. *Lazer v. Chicago City Ry. Co.*, 152 Ill. App. 319.

72. *U. S.*—*Hopper v. Denver & R. G. R. Co.*, 155 Fed. 273, 84 C. C. A. 21.

*Ala.*—*Central of Ga. Ry. Co. v. Geopp*, 153 Ala. 108, 45 So. 65.

*Ill.*—*Pennsylvania Co. v. Purvis*, 128 Ill. App. 367.

*Mass.*—*Chaffee v. Consol. Ry. Co.*, 196 Mass. 484, 82 N. E. 497.

*Wash.*—*Russell v. Seattle, etc., Ry. Co.*, 47 Wash. 500, 92 Pac. 288.

73. *Sedoff v. Chicago City Ry. Co.*, 124 Ill. App. 609; *Hunt v. Metropolitan St. Ry. Co.*, 126 Mo. App. 79, 103 S. W. 1088; *Enos v. Rhode Island Suburban Ry. Co.*, 28 R. I. 291, 67 Atl. 5; *Miller v. United Rys. Co. of St. Louis*, 155 Mo. App. 528, 134 S. W. 1045.

Collision between street cars of the same carrier.—Plaintiff entitled to benefit of the doctrine *res ipsa loquitur*: *Chandla v. St. Louis Transit Co.*, 213 Mo. 244, 112 S. W. 249; *Briggs v. Durham Traction Co.*, 147 N. C. 389, 61 S. E. 373; *Chicago City Ry. Co. v. Greinke*, 136 Ill. App. 77, judg. aff'd *Greinke v. Chicago City Ry. Co.*, 234 Ill. 564, 85 N. E. 327; *Simons v. Rhode Island Co.*, 28 R. I. 186, 60 Atl. 202, 9 L. R. A. (N. S.) 740; *Birmingham Ry., etc., Co. v. Moore*, 148 Ala. 115, 42 So. 1024; *Goodloe v. Metropolitan St. Ry. Co.*, 120 Mo. App. 194, 96 S. W. 482; *Price v. Metropolitan St. Ry. Co.*, 220 Mo. 435, 119 S. W. 932; *Parrent v. Rhode Island Co.*, — R. I. —, 72 Atl. 865; *Barker v. Chicago, etc., Ry.*



a collision the burden was on the carrier to prove that the collision was the result of some unavoidable accident.<sup>74</sup> Where plaintiff, a street car passenger, was injured in a collision between the car on which she was riding while it was standing still letting off passengers at a regular stopping place, and a following car, and two other lines of cars used the track at the place of the accident, which were operated by a company other than defendant, in the absence of evidence that defendant owned and operated the following car that caused the collision, the circumstances of the accident did not establish a *prima facie* case of defendant's negligence under the maxim *res ipsa loquitur*, which applies only to cases where the occurrence would not have happened in the ordinary course except

Co., 149 Ill. App. 520, judg. aff'd 243 Ill. 482, 90 N. E. 1057; Fuhry v. Chicago City Ry. Co., 144 Ill. App. 521, judg. aff'd 239 Ill. 548, 88 N. E. 221; Sewell v. Detroit United Ry., 158 Mich. 407, 16 Detroit Leg. N. 684, 123 N. W. 2.

**Collision between street car and car of another street railroad.**—Presumption of negligence held not to arise from mere fact of collision: Kimie v. San Jose-Los Gatos Interurban Ry. Co., 156 Cal. 379, 104 Pac. 986.

**Collisions between street car and wagon.**—Collision establishes *prima facie* case of negligence: Williamson v. St. Louis, etc., R. Co., 133 Mo. App. 375, 113 S. W. 239, collision with city fire department hose wagon; Bamberg v. International Ry. Co., 103 N. Y. Supp. 297, 53 Misc. Rep. 403, judg. and order rev'd 105 N. Y. Supp. 621, 121 App. Div. 1; Dorr v. Cross-town St. Ry. Co., 106 N. Y. Supp. 1122; Egan v. Old Colony St. Ry. Co., 195 Mass. 159, 80 N. E. 696.

**Collision between railroad train and**

**street car.**—Augustus v. Chicago, etc., Ry. Co., 153 Mo. App. 572, 134 S. W. 22.

Circumstances held not to create *prima facie* proof of carrier's negligence: Barnes v. Danville St. Ry., etc., Co., 235 Ill. 566, 85 N. E. 921.

**Collision with other trains.**—Presumption of negligence created by proof of collision: Dempster v. Oregon Short Line R. Co., 37 Mont. 335, 96 Pac. 717; St. Louis, etc., R. Co. v. Osborne, 95 Ark. 310, 129 S. W. 537; Wood v. Philadelphia, etc., R. Co., 1 Boyce (24 Del.), 613, 76 Atl. 613; Hickey v. Chicago City Ry. Co., 148 Ill. App. 197.

**74. Cal.**—Bonneau v. North Shore R. Co., 152 Cal. 406, 93 Pac. 106.

**Iowa.**—Mitchell v. Chicago, etc., Ry. Co., 138 Iowa, 283, 114 N. W. 622.

**Ky.**—Southern Ry. Co. in Ky. v. Brewer, 32 Ky. Law Rep. 43, 105 S. W. 160.

**Utah.**—Dearden v. San Pedro, etc., R. Co., 33 Utah, 147, 93 Pac. 271.

by negligence on defendant's part.<sup>75</sup> Evidence that the car on which plaintiff was riding ran into a car belonging to another company operating on another street at a crossing, and that plaintiff was injured in the collision, was sufficient to raise a presumption of negligence on the part of the operators of the colliding car, under the doctrine of *res ipsa loquitur*.<sup>76</sup> The mere collision of a street car on which a passenger was riding with a car on another street railroad raised a presumption of negligence by the carrying company, requiring it to show its freedom from fault, but raised no presumption of negligence by the other company.<sup>77</sup> In an action against a street car company for injuries to a passenger in a collision between a car and a metal tower erected in a public square near the track, plaintiff being wholly without fault, the doctrine of *res ipsa loquitur* applies.<sup>78</sup> A passenger who shows that the train collided with the top of a tree which had blown across the track, and that he was injured in consequence thereof, shows facts from which the presumption of negligence of the carrier arises, and it must show its freedom from breach of duty.<sup>79</sup> The presumption of negligence created by a collision resulting in injury to a passenger is rebuttable, and may be overcome by the facts when they appear.<sup>80</sup> Where an injury to a passenger on a street car is caused by a collision between the side of the car while on its own track and a wagon, not under the control of the street railway com-

75. *Elliott v. Brooklyn Heights R. Co.*, 111 N. Y. Supp. 358, 127 App. Div. 300.

76. *Levine v. Brooklyn, etc., R. Co.*, 119 N. Y. Supp. 315, 134 App. Div. 606.

77. *Stanbridge v. Nassau Electric R. Co.*, 119 N. Y. Supp. 668, 135 App. Div. 38, modifying judg. 117 N. Y. Supp. 94.

78. *Wolven v. Springfield Traction Co.*, 143 Mo. App. 643, 128 S. W. 512.

79. *Rice v. Chicago, etc., Ry. Co.*, 153 Mo. App. 35, 131 S. W. 374.

The presumption of negligence of a carrier arising from proof of injury to a passenger in consequence of the train colliding with an obstruction on the track is not overcome in every case by the carrier showing conclusively that the obstruction was not one under its control, because there are instances where a carrier is otherwise negligent, and its negligence has operated proximately to occasion the obstruction. *Id.*

80. *Minneapolis St. Ry. Co. v. Odegaard*, 182 Fed. 56.

pany, no presumption of negligence arises in favor of the passenger against the street car company.<sup>81</sup> Where plaintiff, who was injured in a collision between street cars sued two street railroad companies, and charged that she suffered damages through the negligence of the servants of both, the burden was on her to prove such charge.<sup>82</sup> In an action by a passenger on defendant's street car for injuries caused by the collision of the car with a locomotive at a crossing, where the rate of speed of the street car while approaching the crossing had to be taken into account in considering whether the locomotive was visible to the motorman, and there was no evidence as to its rate of speed, the usual rate could be assumed.<sup>83</sup> Though, where in an action against a railroad for injuries to a passenger in a collision between a passenger train and unprotected box cars on the main track, it devolves on defendant to explain the occurrence in such a way as to free itself from the imputation of negligence, yet, where it has attempted to do so, the court is not authorized to charge that the burden is on defendant to establish by a preponderance of the evidence its freedom from negligence.<sup>84</sup> Where a street car passenger was injured in a collision between defendant's street car and a switch engine, the *res ipsa loquitur* doctrine applied.<sup>85</sup>

### § 5. Presumptions arising from derailment of train or car.

Proof of the derailment of a train or car causing injuries to a passenger raises a presumption of the carrier's negligence and justifies the conclusion, in the absence of evidence to the contrary, that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation. Whenever a car or train leaves the track it proves that either the track or

81. *Blew v. Philadelphia Rap. Transit Co.*, 227 Pa. 319, 76 Atl. 17.

82. *Chlanda v. St. Louis Transit Co.*, 213 Mo. 244, 112 S. W. 249.

83. *Lindenbaum v. New York, etc., R. Co.*, 197 Mass. 314, 84 N. E. 129.

84. *Ft. Worth & D. C. Ry. Co. v. Day* (Tex. Civ. App.), 111 S. W. 663.

85. *Nagel v. United Rys. of St. Louis*, 169 Mo. App. 234, 152 S. W. 621.

machinery, or some portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that the carrier, whose duty it is to keep the track and machinery in the proper condition and to operate it with the necessary prudence and care, has in some respect violated its duty. The carrier is bound to show and give some explanation of the cause of the accident.<sup>86</sup>

**86. Where cause is not shown.**—*N. Y.*—*Stevenson v. Second Ave. R. Co.*, 35 App. Div. (N. Y.) 474, 54 N. Y. Supp. 815; *Armstrong v. Metropolitan St. R. Co.*, 23 App. Div. (N. Y.) 137, 48 N. Y. Supp. 597; *Pollock v. Brooklyn, etc., R. Co.*, 15 N. Y. Supp. 189, 39 St. Rep. (N. Y.) 568; *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Edgerton v. New York, etc., R. Co.*, 39 N. Y. 27; *Webster v. Elmira, etc., R. Co.*, 85 Hun (N. Y.), 167, 32 N. Y. Supp. 590. *Compare* *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9. *U. S.*—*Albion Lumber Co. v. De Nobra*, 72 Fed. 739.

*Ala.*—*Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209; *Louisville, etc., R. Co. v. Jones*, 83 Ala. 376.

*Ark.*—*Eureka Springs R. Co. v. Timmons*, 51 Ark. 459; *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10.

*Cal.*—*Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62.

*Ga.*—*Electric Car Co. v. Carson*, 98 Ga. 652, 27 S. E. 156; *Central R. Co. v. Freeman*, 75 Ga. 331; *Central R. Co. v. Sanders*, 73 Ga. 513; *Yonge v. Kinney*, 23 Ga. 111.

*Ill.*—*Peoria, etc., R. Co. v. Reynolds*, 88 Ill. 418; *Elgin City R. Co.*

*v. Wilson*, 56 Ill. App. 364; *Pittsburgh, etc., R. Co. v. Thompson*, 56 Ill. 138.

*Ind.*—*Ohio, etc., R. Co. v. Voight*, 122 Ind. 288; *Louisville, etc., R. Co. v. Jones*, 108 Ind. 551.

*Iowa.*—*Cronk v. Wabash R. Co.*, 123 Iowa, 349, 98 N. W. 884; *Perishing v. Chicago, etc., R. Co.*, 71 Iowa, 561.

*Kan.*—*Atchison, etc., R. Co. v. Elder*, 57 Kan. 312; *Southern Kansas R. Co. v. Walsh*, 45 Kan. 653.

*Ky.*—*Louisville, etc., R. Co. v. Smith*, 2 Duv. (Ky.) 556.

*Me.*—*Stevens v. European, etc., R. Co.*, 66 Me. 74.

*Mass.*—*Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720.

*Mo.*—*Heyde v. St. Louis Transit Co.*, 102 Mo. App. 537, 77 S. W. 127; *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 22 Am. St. Rep. 781; *Dimitt v. Hannibal, etc., R. Co.*, 40 Mo. App. 654; *Hipsley v. Kansas City, etc., R. Co.*, 88 Mo. 348.

*N. J.*—*Bergen County Tract Co. v. Demarest*, 62 N. J. L. 755, 42 Atl. 729.

*Neb.*—*Spellman v. Lincoln Rap. T. Co.*, 36 Neb. 890, 38 Am. St. Rep. 753.

*Ohio.*—*Cincinnati St. R. Co. v.*

Where the derailment of a train, injuring a passenger, is unexplained, negligence of the carrier is presumed.<sup>87</sup> Where the re-

*Kelsey*, 9 Ohio C. C. 170, 2 Ohio Dec. 440; *Cincinnati, etc.*, R. Co. v. Brown, 2 Ohio Dec. 494.

*Pa.*—*Reading City Pass. R. Co. v. Eckert (Pa.)*, 4 Atl. 530.

*W. Va.*—*Carrico v. West Virginia Cent., etc.*, R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

*Tex.*—*Texas, etc.*, R. Co. v. Suggs, 62 Tex. 323; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010; *Fordyce v. Withers*, 1 Tex. Civ. App. 540. But see *San Antonio, etc.*, R. Co. v. Robinson, 73 Tex. 277; *Texas Pac. R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, proof of circumstances necessary.

*Eng.*—*Bird v. Great Northern R. Co.*, 28 L. J. Exch. 3; *Great Western R. Co. v. Fawcett*, 8 L. T. N. S. 31; *Dawson v. Manchester, etc.*, R. Co., 5 L. T. N. S. 682, 7 H. & N. 1037.

**Defective rail.**—*N. Y.*—*Curtis v. Rochester, etc.*, R. Co., 18 N. Y. 534, 75 Am. Dec. 258; *Brignoli v. Chicago, etc.*, R. Co., 4 Daly (N. Y.), 182.

*Ala.*—*Alabama, etc.*, R. Co. v. Hill, 93 Ala. 514, 30 Am. St. Rep. 65.

*Ark.*—*George v. St. Louis, etc.*, R. Co., 34 Ark. 613.

*Ill.*—*Heagle v. Indianapolis, etc.*, R. Co., 76 Ill. 501; *Galena, etc.*, R. Co. v. Yarwood, 17 Ill. 509, 65 Am. Dec. 682.

*Ind.*—*Cleveland, etc.*, R. Co. v. Newell, 75 Ind. 542; *Pittsburgh, etc.*, R. Co. v. Williams, 74 Ind. 462.

*Eng.*—*Pym v. Great Northern R.*

*Co.*, 2 F. & F. 619; *Carpue v. London, etc.*, R. Co., 5 Q. B. 747, 48 E. C. L. 747.

**Defective or misplaced switch.**—*Klinger v. United Tract. Co.*, 92 App. Div. (N. Y.) 100, 87 N. Y. Supp. 864; *Curtis v. Rochester, etc.*, R. Co., 18 N. Y. 534, 75 Am. Dec. 258; *Denver, etc.*, R. Co. v. Woodward, 4 Colo. 1; *Moore v. Des Moines, etc.*, R. Co., 69 Iowa, 491; *Baltimore, etc.*, R. Co. v. Worthington, 21 Md. 275, 83 Am. Dec. 578; *Logan v. Metropolitan St. R. Co.*, 183 Mo. 582, 82 S. W. 126.

**Landslide in cut.**—*Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435.

**Washout of embankment.**—*Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256; *Philadelphia, etc.*, R. Co. v. Anderson, 94 Pa. St. 351, 39 Am. Rep. 787; *Great Western R. Co. v. Fawcett*, 9 Jur. N. S. 339.

**Giving way of bridge or trestle.**—*Louisville, etc.*, R. Co. v. Pedigo, 108 Ind. 481, 27 Am. & Eng. R. Cas. 310; *Louisville, etc.*, R. Co. v. Thompson, 107 Ind. 442, 57 Am. Rep. 120; *Bedford, etc.*, R. Co. v. Rainbolt, 99 Ind. 551; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442; *Baltimore, etc.*, R. Co. v. Noell, 32 Gratt. (Va.) 394; *Baltimore, etc.*, R. Co. v. Wightman, 29 Gratt. (Va.) 431. And see *Sawyer v. Hannibal, etc.*, R. Co., 37 Mo. 240, 90 Am. Dec. 382, where a bridge was burned by the public enemy.

**87.** *Hill v. Chicago City Ry. Co.*, 126 Ill. App. 152; *Bowlin v. Union Pac. R. Co.*, 125 Mo. App. 419, 102

lation of passenger and carrier exists, a derailment resulting in an injury to a passenger raises a presumption of negligence on the part of the carrier.<sup>88</sup> Where a passenger on a street car is injured by the derailment of the car, it raises a presumption of negligence on the part of the carrier,<sup>89</sup> and throws on the carrier the burden of proving that the accident could not have been prevented by the exercise of the highest degree of care.<sup>90</sup> The presumption of negligence may be rebutted by proof that the accident was not caused by any negligence or want of care on the carrier's part.<sup>91</sup> The presumption of negligence of the carrier, arising from proof by a passenger of the derailment of the train and consequent injury to him, is one of fact, and may be overcome by proof that the derailment resulted from unavoidable accident, or was an occurrence which could not have been provided against by the highest practicable degree of foresight.<sup>92</sup> The derailing of a train by collision or otherwise is *prima facie* evidence of negligence of the carrier.<sup>93</sup> From the derailment of a car by which a passenger was injured, a presumption arises that it occurred by the carrier's negligence, and places on it the burden of accounting for the derailment, and of showing that it was without negligence on the part of its servants.<sup>94</sup> Where, in an action for injuries to a passenger by derail-

S. W. 631; Galveston, etc., Ry. Co. v. Gracia (Tex. Civ. App.), 100 S. W. 198.

88. *Sherman v. Southern Pac. Co.*, 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, and it is the duty of the carrier to know and show the facts.

89. *Braun v. Union Ry. Co. of N. Y. City*, 100 N. Y. Supp. 1012, 115 App. Div. 566; *Houston & T. C. R. Co. v. Cheatham* (Tex. Civ. App.), 113 S. W. 777; *Southern Pac. Co. v. Hogan*, 13 Ariz. 34, 108 Pac. 240; *Hickey v. Chicago City Ry. Co.*, 148 Ill. App. 197.

90. *Louisville St. Ry. Co. v. Brown-*

*field*, 29 Ky. Law Rep. 1097; *Southern Pac. Co. v. Blake* (Tex. Civ. App.), 128 S. W. 668.

91. *Braunstein v. People's Ry. Co.* (Del Super.), 78 Atl. 609.

92. *Texas & P. Ry. Co. v. Mosley* (Tex. Civ. App.), 124 S. W. 435.

93. *Freeman v. Davis* (Tex. Civ. App.), 117 S. W. 186; *Norfolk & W. Ry. Co. v. Rhodes*, 109 Va. 176, 63 S. E. 445.

94. *Sloan v. Little Rock Ry., etc., Co.*, 89 Ark. 574, 117 S. W. 551; *Muskogee Electric Traction Co. v. McIntire* (Okla.), 133 Pac. 213.

ment of the car, the carrier gave evidence from which the jury could find that it had used due care in the construction, equipment, and maintenance of the railway, the burden of proof was not shifted, but remained on plaintiff to establish the carrier's negligence on all the evidence, of which the presumption of negligence on proof of the derailment and injury formed only a part.<sup>95</sup> Where a street car passenger was injured by the derailment of a car caused by a brick on the track, plaintiff established a *prima facie* case by proof of her relation as a passenger, and that she was injured by the derailment of the car.<sup>96</sup> Where, in an action for injuries to a passenger by the derailment of a train, it was shown that the derailment was caused by a cyclone, the presumption of negligence arising therefrom did not obtain, and the burden was on plaintiff to prove defendant's negligence.<sup>97</sup> In an action by a passenger for injuries received by the derailment of the train, a presumption of negligence of the carrier arises from such derailment resulting from the defective condition of the track, or defective equipment, or negligent operation or handling of the train.<sup>98</sup> Where decedent was injured by being thrown against the stove by the sudden derailment of a street car, in an action for his death plaintiff could assume that the derailment was caused by negligence, and if the company did not show its want of negligence, or that the accident was caused by an independent cause, it would be conclusively presumed that the accident was caused by its negligence.<sup>99</sup> Where a complaint clearly shows the relation of carrier and passenger, and it appears that the plaintiff, the passenger, was injured by a derailment, the rule of *res ipsa loquitur* applies, notwithstanding several causes are alleged to have produced the derailment.<sup>1</sup> The

95. *Carroll v. Boston Elev. Ry. Co.*, 200 Mass. 527, 86 N. E. 793.

96. *O'Gara v. St. Louis Transit Co.*, 204 Mo. 724, 103 S. W. 54.

97. *Galveston, etc., Ry. Co. v. Crier* (Tex. Civ. App.), 100 S. W. 1177.

98. *Arkansas Midland R. Co. v.*

*Rambo*, 90 Ark. 108, 117 S. W. 784.

99. *McDonald v. Metropolitan St. Ry. Co.*, 219 Mo. 468, 118 S. W. 78.

1. *Southern Ry. Co. v. Adams* (Ind. App.), 100 N. E. 773, such specifications only limit the grounds on which defendant must defend.

fact that the wheels of a passenger car left the rails and ran along the ties without any showing of defective wheels or trucks made a strong *prima facie* showing that the track or roadbed was defective.<sup>2</sup> The burden of proof on the whole case resting on a passenger suing for injuries by the derailment of the train never shifts, though proof of an accident to the train and injury to the passenger creates a presumption of fact against the carrier.<sup>3</sup>

## § 6. Presumption arising from defects in means of transportation.

The presumption of negligence on the part of the carrier, as a general rule, arises in cases of injuries to passengers arising from defects in the means of transportation.<sup>4</sup> But the presump-

2. *Williams v. Chicago, etc., Ry. Co.*, 169 Mo. App. 463, 155 S. W. 64.

3. *Abilene & S. Ry. Co. v. Burleson* (Tex. Civ. App.), 157 S. W. 1177.

Where cause is not shown.—*St. Louis S. W. Ry. Co. v. Letlar*, — Ark. —, 149 S. W. 530; *Lake Shore Electric Ry. v. Hobart*, 32 Ohio Cir. Ct. R. 154; *Washington-Virginia Ry. Co. v. Bouknight*, 113 Va. 696, 75 S. E. 1032; *Sherman v. Southern Pac. Co.*, 33 Nev. 385, 115 Pac. 909, denying rehearing 111 Pac. 416; *Parker v. Boston M. R. Co.*, 84 Vt. 329, 79 Atl. 865; *Reems v. New Orleans G. N. R. Co.*, 126 La. 511, 52 So. 631; *Chicago, etc., R. Co. v. Brandon*, 77 Kan. 612, 95 Pac. 575; *Houston & T. C. R. Co. v. Lindsey* (Tex. Civ. App.), 110 S. W. 995.

Collapsing of bridge or trestle.—*Roanoke Ry., etc., Co. v. Sterrett*, 111 Va. 293, 68 S. E. 993.

4. *N. Y.*—*Miller v. Ocean Steamship Co.*, 118 N. Y. 199; *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Hitchcock v. Brook-*

*lyn City R. Co.*, 44 Hun (N. Y.), 627, 8 St. Rep. (N. Y.) 848.

*Ind.*—*Louisville, etc., Ferry Co. v. Nolan*, 135 Ind. 60.

*Md.*—*Baltimore, etc., R. Co. v. State*, 63 Md. 135.

*Minn.*—*Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 37 Am. Rep. 410.

*Mo.*—*Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666.

*Pa.*—*Clow v. Pittsburgh Tract. Co.*, 158 Pa. St. 410; *Fleming v. Pittsburgh, etc., R. Co.*, 158 Pa. St. 130, 38 Am. St. Rep. 835; *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533.

*Va.*—*Baltimore, etc., R. Co. v. Noell*, 32 Gratt. (Va.) 394; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. (Va.) 431, 26 Am. Rep. 334.

*Eng.*—*Harrison v. London, etc., R. Co.*, 1 C. & E. 540.

A presumption of negligence arises from:

Hand rail on street car giving way.—*McCarty v. St. Louis, etc., R. Co.*, (Mo. App.), 80 S. W. 7.



tion of negligence does not arise where, although there was some

**Defect in carrier's appliances.**—Whalen v. Consol. Tract. Co., 61 N. J. L. 606, 40 Atl. 645, 11 Am. & Eng. R. Cas. N. S. 207, 4 Am. Neg. Rep. 422, 41 L. R. A. 836; Kefauver v. Philadelphia, etc., R. Co., 122 Fed. 966.

**Breaking down of means of transportation.**—Choquette v. Southern Elec. R. Co., 80 Mo. App. 515, 2 Mo. A. Repr. 655.

**Car appearing to be on fire.**—Poulson v. Nassau Elec. R. Co., 18 App. Div. (N. Y.) 221, 45 N. Y. Supp. 941.

**Improper condition of street railway track.**—Casper v. Dry Dock, etc., R. Co., 23 App. Div. (N. Y.) 451, 48 N. Y. Supp. 352.

**Breaking of trolley pole.**—Keator v. Scranton Tract. Co., 191 Pa. 102, 44 W. N. C. 128, 6 Am. Neg. Rep. 187, 44 L. R. A. 546, 43 Atl. 86.

**Breaking of an appliance.**—Murray v. Pawtuxet Val. St. R. Co., 25 R. I. 209, 55 Atl. 491.

**Breaking of axle.**—Hegeman v. Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517; Alden v. New York Cent. R. Co., 26 N. Y. 102, 82 Am. Dec. 401; Ohio, etc., R. Co. v. Voight, 122 Ind. 288; Meier v. Pennsylvania R. Co., 4 U. C. C. P. 543; Dawson v. Manchester, etc., R. Co., 7 H. & N. 1037; Western Maryland R. Co. v. State, 95 Md. 637, 53 Atl. 969.

**Breaking of car wheel.**—Toledo, etc., R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613.

**Breaking of coupling pin.**—McLean v. Burbank, 11 Minn. 277;

Goodrich v. Pennsylvania, etc., Canal Co., 29 Hun (N. Y.) 50.

**Breaking of bolt.**—Germain v. Montreal, etc., R. Co., 6 L. C. Rep. 172.

**Falling of sleeping car berth.**—Cleveland, etc., R. Co. v. Walrath, 38 Ohio St. 461.

**Explosion of boiler of locomotive.**—Robinson v. New York Cent. etc., R. Co., 20 Blatchf. (U. S.) 338.

**Explosion of lamp.**—Wilkie v. Bolster, 3 E. D. Sm. (N. Y.) 327.

**Breaking of axle of stage coach.**—Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799; Christie v. Griggs, 2 Campb. 79; Israel v. Clark, 4 Esp. N. P. 259.

**Wheel coming off.**—Ware v. Gay, 28 Mass. (11 Pick.) 106.

**Explosion of boiler of steamboat.**—Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Spear v. Philadelphia, etc., R. Co., 119 Pa. St. 61; Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71; The Steamboat New World v. King, 16 How. (U. S.) 469; Dunlap v. Steamboat Reliance, 2 Fed. 249; The Reliance, 4 Woods (U. S.) 420; Fay v. Davidson, 13 Minn. 523.

**Breaking of paddle wheel.**—Yerkes v. Keokuk Northern Line Packet Co., 7 Mo. App. 265.

**Breaking of ship's mooring to wharf.**—Miller v. Ocean Steamship Co., 118 N. Y. 199.

**Falling of gang plank.**—Eagle Packet Co. v. Defries, 94 Ill. 598, 34 Am. Rep. 245.

**Falling of berth on boat.**—Smith

defect in the means of transportation, the accident causing the injury could not have occurred had there not been an improper exposure to danger on the part of the passenger; as where a passenger's arm was out of the window when struck,<sup>5</sup> or an active and voluntary movement on his part contributed to the accident,<sup>6</sup> or he was riding in an improper place.<sup>7</sup> It is only in respect to those accidents which happen to the passenger when he passively trusts himself to the safety of the carrier's means of transportation, or to the skill, diligence, and care of its servants, that the rule applies.<sup>8</sup> The fact that a passenger is injured while necessarily standing on the platform of a car is not in itself a cause for action against a railway company, if the accident is caused by the act of the plaintiff himself, or that of another passenger.<sup>9</sup>

*v. British, etc., Packet Co.*, 46 N. Y. Super. Ct. 86.

But a presumption of negligence does not arise from:

**Rail breaking and car running off the track.**—*Cole v. New York Cent. R. Co.*, 48 N. Y. 679.

**Passenger thrown from platform in starting of car.**—*Hayes v. Forty-Second St., etc., R. Co.*, 97 N. Y. 259.

**Passenger thrown down by jerk in rounding curve.**—*Ayres v. Rochester R. Co.*, 156 N. Y. 104.

**Failure to carry to destination.**—*Mt. Adams, etc., R. Co. v. Isaacs*, 18 Ohio C. C. 177.

5. *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 238, 64 Am. Dec. 502; *Pittsburgh, etc., R. Co. v. Andrews*, 39 Md. 329, 71 Am. Rep. 568.

6. *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

7. *Tuley v. Chicago, etc., R. Co.*, 41 Mo. App. 432.

8. *Indianapolis, etc., R. Co. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 336; *Morel v. Mississippi Valley L. Ins. Co.*, 4 Bush (Ky.) 535; *Todd v. Old Colony R. Co.*, 3 Allen (Mass.) 21, 80 Am. Dec. 49; *Pittsburgh, etc., R. Co. v. McClurg*, 56 Pa. St. 294; *Texas, etc., R. Co. v. Overall*, 82 Tex. 247; *Weaver v. Baltimore, etc., R. Co.*, 22 Wash. L. Rep. (D. C.) 393.

9. *Rolette v. Great Northern R. Co. (Minn.)*, 97 N. W. 431. See also *Willis v. Long Island R. Co.*, 34 N. Y. 670; *Louisville, etc., R. Co. v. Bisch*, (Ind.), 22 N. E. 662; *Cleveland, etc., R. Co. v. Moneyhun (Ind.)*, 44 N. E. 1106, 34 L. R. A. 141; *Camden, etc., R. Co. v. Hoosey*, 99 Pa. 492, 44 Am. Rep. 120; *Worthington v. Railway Co.*, 64 Vt. 107, 23 A. T. L. 590, 15 L. R. A. 326; *Ward v. Railway Co.*, 102 Wis. 215, 78 N. W. 442; *Fisher v. Railway Co. (W. Va.)*, 24 S. E. 570, 33 L. R. A. 69.

### § 7. Presumption of negligence as to injuries to persons other than passengers.

It has been held by the courts in certain jurisdictions that this presumption of negligence arises only when there exists a contractual relation, like that of passenger and carrier between the parties, and that it does not apply to persons holding other relations.<sup>10</sup> But it is held elsewhere that a contractual relation is not essential, and that the same presumption arises when such relation does not exist.<sup>11</sup> In an action against a street railway company where the plaintiff's evidence showed that his wagon was standing on one of the defendant's tracks, and that in front of him were two cars, and that, as the second car moved up a grade, the trolley wheel slipped, and the car slipped backward and struck the car back of it, when either the force of the collision drove the rear car against the wagon, or the motorman of that car moved it backward to avoid a collision, it was held that the evidence raised a presumption of negligence on the part of the defendant, and made it incumbent on it to show due care.<sup>12</sup> So, where the plaintiff, while walking across the street, was struck by a stick which flew from the hands of the defendant's car conductor, who was using it to free the

10. *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. 613; *Young v. Bransford*, 12 Lea (Tenn.) 232. In an action against the company brought by a person not a passenger, the law has been held in some cases not to raise a presumption of negligence against the defendant. In such cases, on the issue of defendant's negligence, the burden of proof rests on the plaintiff, and he cannot recover without establishing the fact alleged by a fair preponderance of evidence. *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Philadelphia City Pass. Ry. Co. v. Henrice*, 92 Pa. St. 431; *North Chicago City Ry. Co. v. Louis* (Ill.), 27 N. E.

451; *O'Neil v. Dry Dock, etc., R. Co.*, 129 N. Y. 125; *Thomas v. Citizens' Pass. Ry. Co.*, 132 Pa. St. 504; *Roller v. Sutter St. R. Co.*, 66 Cal. 230; *North Side St. Ry. Co. v. Want* (Tex.), 15 S. W. 40; *Gumb v. Twenty-third St. Ry. Co.*, 58 N. Y. Super. Ct. 1; *Girard College Pass. Ry. Co. v. Middleton*, 3 W. N. C. (Pa.) 486; *Potts v. Chicago City Ry. Co.*, 33 Fed. Rep. 610.

11. *Rose v. Stephens Transp. Co.*, 11 Fed. 483; *Judson v. Giant Powder Co.*, 107 Cal. 549, 201 Pa. 167, 50 Atl. 829.

12. *Campbell v. Consol. Tract. Co.*, 201 Pa. 167, 50 Atl. 829.

trolley, which had caught in the frog at the junction of some over-head wires;<sup>13</sup> where plaintiff's horse was frightened by a loud and unusual noise proceeding from an electric car, and a volume of smoke issuing therefrom, and the horse ran away, and plaintiff was injured;<sup>14</sup> and where plaintiff was injured while driving under defendant's elevated railroad, by an iron bar falling from such railroad, a presumption of negligence on the part of the defendant arises.<sup>15</sup> The unexplained breaking of an ear and guy used by an electric railway company raises a presumption of negligence on the part of the company.<sup>16</sup> That an electric wire had become disconnected or detached from its fastening, and hung down in a public alley so as to endanger public travel;<sup>17</sup> and the falling of a trolley wire into the street,<sup>18</sup> raises a presumption of negligence on the part of the company which maintains such wire. But the mere breaking of a trolley wire does not raise a presumption of negligence against a traction company in an action for personal injuries resulting from the fright of a horse caused by the breaking of such wire.<sup>19</sup> Where the span wire of an electric railroad breaks and falling to the sidewalk strikes and burns a pedestrian, the doctrine, *res ipsa loquitur*, applies, and there is a presumption of negligence on the defendant's part which it is called upon to explain or rebut.<sup>20</sup> Where plaintiff's horse upon stepping

13. *Manning v. West End St. R. Co.*, 166 Mass. 230, 44 N. E. 135; *Denver Consol. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566, holding that the jury may infer the unfitness of a switch stick from the fact that it flew from the hands of a conductor and injured a person on the street while it was being used to free a trolley from a frog in the wires, as this may show that there was unnecessary danger in its use without India rubber gloves.

14. *Richmond Ry. & Elec. Co. v. Hudgins (Va.)*, 41 S. E. 736.

15. *Hogan v. Manhattan R. Co.*, 149 N. Y. 23, 43 N. E. 403.

16. *Uggle v. West End St. R. Co.*, 4 Am. Electl. Cas. 389, 160 Mass. 351, 35 N. E. 1126.

17. *Denver Consol. E. Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499.

18. *O'Flaherty v. Nassau Elec. R. Co.*, 34 App. Div. (N. Y.) 75, 7 Am. Electl. Cas. 535, 54 N. Y. Supp. 96, affd. 59 N. E. 1128, 165 N. Y. 624.

19. *Kepner v. Harrisburg Tract. Co.*, 183 Pa. 24, 38 Atl. 416.

20. *Jones v. Union Ry. Co.*, 18

upon a rail of defendant's electric railroad, sprung into the air and fell upon the track where it died in a few minutes, and plaintiff in putting his hands on the hames of the harness received a severe shock, the facts were sufficient to justify the inference that the accident was due to the agency of the defendant.<sup>21</sup> The unexplained breaking down of a scaffold while an employe is thereon is presumptive evidence of the master's negligence.<sup>22</sup> Evidence that plaintiff while somewhat intoxicated signaled a west-bound horse car, and to reach it crossed over the other track on which a car was approaching at a fast trot, about three hundred feet away, and that as he took hold of the west-bound car he fell, and the east-bound car passed over his foot, raises the presumption that there was negligence on the part of those in charge of the east-bound car which was the cause of the accident.<sup>23</sup> But, an accident to a person waiting for a street car, who is struck by the sudden switching of the car upon a side track, does not make a *prima facie* case of negligence on the part of the carrier.<sup>24</sup> The mere fact that an employe is killed by a fall from a hand car while crossing a bridge of his employer's railroad is not evidence that the killing was caused by the negligence of the employer's agents or servants.<sup>25</sup> Negligence on the part of the driver of a horse car cannot be inferred from his mere failure to stop the car within a very short distance from a child who has fallen upon the track.<sup>26</sup> Negligence on the part of an employer cannot be inferred from the mere fact that an accident happened to an employe.<sup>27</sup> The doctrine.

App. Div. (N. Y.) 267, 46 N. Y. Supp. 321.

21. Clarke v. Nassau Elec. R. Co., 9 App. Div. (N. Y.) 51, 41 N. Y. Supp. 78.

22. Solarz v. Manhattan R. Co., 29 N. Y. Supp. 1123, 59 N. Y. St. Rep. 537, 8 Misc. Rep. (N. Y.) 856, 31 Abb. N. C. 426.

23. Forwood v. Toronto, 22 Ont. Rep. 351, 56 Am. & Eng. R. Cas. 445.

24. Donovan v. Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350.

25. Jones v. Alabama Mineral R. Co., 107 Ala. 400, 18 So. 30.

26. Lavin v. Second Ave. R. Co., 12 App. Div. (N. Y.) 381, 42 N. Y. Supp. 512.

27. Lincoln St. R. Co. v. Cox, 48 Neb. 807, 67 N. W. 740, 4 Am. & Eng. R. Cas. N. S. 273.

*res ipsa loquitur*, does not apply in an action for personal injuries by the conductor of a cable car of one company against another company, based on the fact that the latter company was repairing the crossing of the lines of the two companies, where the circumstances would justify the inference that the accident, which was caused by the displacement of the slot in which the grip ran, was caused by the negligence of the gripman of the plaintiff's car in disregarding directions to run slowly over the crossing.<sup>28</sup> A *prima facie* case is not made out against a street railroad company in an action for personal injuries, based upon the breach of an *ultra vires* city ordinance, by the mere introduction of the ordinance in evidence without objection, in the absence of proof that defendant agreed to be bound by it.<sup>29</sup> The statutes in some States provide that in certain cases proof of injury shall raise a presumption of negligence, which it devolves upon the defendant to rebut.<sup>30</sup> Proof of the violation of such a statute is evidence simply of one of the elements of negligence, that defendant failed to exercise ordinary care, and the elements of duty and proximate cause of the injury have still to be established.<sup>31</sup>

28. *Bailey v. Citizens' R. Co.*, 152 Mo. 449, 52 S. W. 406.

29. *Sanders v. Southern Elec. R. Co.*, 147 Mo. 411, 48 S. W. 855.

30. *Chicago, etc., R. Co. v. Trotter*, 60 Miss. 442; *Mobile, etc., R. Co. v. Dale*, 61 Miss. 206, 20 Am. & Eng. R. Cas. 651; *Vicksburg, etc., R. Co. v. Phillips*, 64 Miss. 693, 30 Am. & Eng. R. Cas. 587; *Columbus, etc., R. Co. v. Kennedy*, 78 Ga. 646, 31 Am. & Eng. R. Cas. 92; *Central R. Co. v. Brinson*, 64 Ga. 475, 8 Am. & Eng. R. Cas. 343; *Vickers v. Atlanta, etc., R. Co.*, 64 Ga. 306, 8 Am. & Eng. R. Cas. 337. In Mississippi and Georgia the presumption against the railroad company arises in all cases of injury. In other states where there

is such a statute the presumption arises only in cases of injury to property by fire.

31. *Briggs v. New York Cent. R. Co.*, 72 N. Y. 26; *McGrath v. New York, etc., R. Co.*, 63 N. Y. 522; *Philadelphia, etc., R. Co. v. Stebbing*, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; *Correll v. Baltimore, etc., R. Co.*, 38 Iowa, 120; *Hoppe v. Chicago, etc., R. Co.*, 61 Wis. 357; *New Orleans, etc., R. Co. v. Toulme*, 59 Miss. 284; *Pennsylvania R. Co. v. Hensil*, 70 Ind. 569; *Chicago, etc., R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761; *Augusta, etc., R. Co. v. McElmurry*, 24 Ga. 75; *Philadelphia, etc., R. Co. v. Kerr*, 25 Md. 521; *Hanlon v. South Boston, etc., R. Co.*, 129 Mass. 31;

### § 8. Reasons for presumption of negligence.

The reasons for the presumption of negligence from the circumstances attending the injury to a passenger have been variously stated by the courts. In some cases the presumption is based upon the ground that the carrier not only has the entire control of the vehicle, but also of the track upon which it runs, and it owes a duty to the passenger to keep both in a perfect and safe condition for the transportation of passengers with entire safety, so far as human prudence can accomplish these results, and that the happening of an accident causing injury to the passenger is *prima facie* evidence of a violation of this duty in some respect.<sup>32</sup> In other cases it is said that where an act takes place which usually, and according to the ordinary course of things, would not happen if proper care were exercised, it is to be presumed that such care was not observed.<sup>33</sup> In other cases the reason for the presumption is put upon the ground that the carrier usually has almost exclusively the means of knowing what actually occasioned the injury, either within its possession or under its control, and likewise the means of explaining how it occurred, while the passenger as a rule is without knowledge of the facts necessary to establish the carrier's negligence.<sup>34</sup>

Hayes v. Michigan, etc., R. Co., 111 U. S. 228, 15 Am. & Eng. R. Cas. 394; Clark v. Boston, etc., R. Co., 64 N. H. 323, 31 Am. & Eng. R. Cas. 548; Atlanta, etc., R. Co. v. Wyly, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; Karle v. Kansas City, etc., R. Co., 55 Mo. 476; Quincy, etc., R. Co. v. Wellhoener, 72 Ill. 60. In Tennessee only is proof of a violation of the statute at the time of the injury held to be conclusive evidence of defendant's liability. Tennessee R. Co. v. Walker, 11 Heisk (Tenn.) 383; Nashville, etc., R. Co. v. Thomas, 5 Heisk (Tenn.) 262; Collins v. East Tennessee R. Co., 9 Heisk. 841.

Co., 39 N. Y. 229; Curtiss v. Rochester, etc., R. Co., 18 N. Y. 534; Walker v. Erie R. Co., 63 Barb. (N. Y.) 260; Dougherty v. Missouri Pac. R. Co., 9 Mo. App. 484.

33. Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Breen v. New York Cent., etc., R. Co., 109 N. Y. 297; Holbrook v. Utica, etc., R. Co., 12 N. Y. 236, 64 Am. Dec. 502; Rose v. Stephens, etc., Transp., 20 Blatchf. (U. S.) 411.

34. Delaware, etc., R. Co. v. Naphys, 90 Pac. St. 135; Stevens v. European, etc., R. Co., 66 Me. 64; Saltonstall v. Stockton, Taney (U. S.) 11, 13 Pet. (U. S.) 181.

32. Edgerton v. New York, etc., R.

### § 9. Rebutting presumption.

There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of the carrier, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the carrier, afford sufficient evidence that the accident arose from a want of care on its part and thus cast upon the carrier the burden of disproving it.<sup>35</sup> To rebut such presumption the carrier must show that the injury was caused without its fault or negligence or that the accident occurred from circumstances against which human prudence and foresight could not guard,<sup>36</sup> or was caused by an act of God or *vis major*,<sup>37</sup> or by the

35. *Breen v. New York Cent., etc.*, R. Co., 109 N. Y. 297; *Bush v. Barnett*, 96 Cal. 202; *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010; *Thatcher v. Great Western R. Co.*, 4 U. C. C. P. 543; *Flaunery v. Waterford, etc.*, R. Co., 11 Ir. R. C. L. 30.

36. *N. Y.*—*Bowen v. New York Cent. R. Co.*, 18 N. Y. 408, 72 Am. Dec. 529; *Curtis v. Rochester, etc.*, R. Co., 18 N. Y. 534, 75 Am. Dec. 258; *Holbrook v. Utica, etc.*, R. Co., 12 N. Y. 26, 64 Am. Dec. 502; *Wilkie v. Bolster*, 3 E. D. Sm. (N. Y.) 327; *Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256.

*Ala.*—*St. Louis, etc.*, R. Co. v. *Mitchell*, 57 Ark. 418.

*Cal.*—*Bush v. Barnett*, 96 Cal. 202; *Fairechild v. California Stage Co.*, 13 Cal. 599.

*Ga.*—*Young v. Kinney*, 28 Ga. 111.

*Ill.*—*Toledo, etc.*, R. Co. v. *Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Pittsburg, etc.*, R. Co. v. *Thompson*, 56

Ill. 138; *Galena, etc.*, R. Co. v. *Yarwood*, 17 Ill. 509, 65 Am. Dec. 682; *Heazle v. Indianapolis, etc.*, R. Co., 76 Ill. 501.

*Ind.*—*Cleveland, etc.*, R. Co. v. *Newell*, 104 Ind. 264, 54 Am. Rep. 312.

*Ky.*—*Central Pac. R. Co. v. Kuhn*, 86 Ky. 578, 9 Am. St. Rep. 309; *Louisville, etc.*, R. Co. v. *Ritter*, 85 Ky. 368.

*La.*—*Julien v. Steamer Wade Hampton*, 27 La. Ann. 377.

*Md.*—*Stockton v. Frey*, 4 Gill (Md.) 406, 45 Am. Dec. 138.

*Mass.*—*Ware v. Gay*, 28 Mass. (11 Pick.) 106.

*Miss.*—*Eldridge v. Minneapolis, etc.*, R. Co., 32 Minn. 253.

*Mo.*—*Sawyer v. Hannibal, etc.*, R. Co., 37 Mo. 240, 90 Am. Dec. 382.

*Pa.*—*Reading City Pass. R. Co. v. Eckert (Pa.)*, 4 Atl. 530; *Pittsburgh, etc.*, R. Co. v. *Pillow*, 76 Pa. St. 510; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581; *Sullivan v. Philadelphia, etc.*, R. Co., 30 Pa. St.



tortious act of a stranger against which the utmost care and diligence could not have guarded,<sup>38</sup> or by the contributory negligence of the passenger,<sup>39</sup> or by the violation of some regulations of the carrier known to the passenger.<sup>40</sup> The presumption that a person on a train used for the carrying of passengers is, in the absence of countervailing circumstances, a passenger and rightfully there, may be rebutted, and does not apply to one seen to go on the platform of a mail car, or of some other car not run for the accommodation or use of passengers.<sup>41</sup>

### § 10. Other presumptions.

Evidence showing that plaintiff was riding on a ticket purchased at defendant's ticket office, and at the time of the collision was a passenger on the train of the defendant, which was being operated over its railroad, is *prima facie* proof that the train was being operated by and in charge of defendant's servants.<sup>42</sup> Where plaintiff took passage on defendant's freight train under an agreement with the brakeman, and did not ride in the caboose but on a coal car, it was not to be presumed that the brakeman had authority to make such agreement, or that plaintiff acquired the relation of passenger by getting on the car, but the burden was on plaintiff to prove such facts.<sup>43</sup> Courts will take judicial notice of

234, 72 Am. Dec. 698; Laing v. Colder, 8 Pa. St. 483, 49 Am. Dec. 533.

Va.—Baltimore, etc., R. Co. v. Wrightman, 29 Gratt. (Va.) 431, 26 Am. Rep. 384; Farish v. Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

37. Gillespie v. St. Louis, etc., R. Co., 6 Mo. App. 554; Ellet v. St. Louis, etc., R. Co., 76 Mo. 518 MeClary v. Sioux City, etc., R. Co., 3 Neb. 44, 19 Am. Rep. 631.

38. Deyo v. New York Cent. R. Co., 34 N. Y. 9; Worth v. Chicago, etc., R. Co., 51 Fed. 171; Fredericks

v. Northern Cent. R. Co., 157 Pa. St. 103; Latch v. Rummer R. Co., 27 L. J. Exch. 155.

39. Louisville, etc., R. Co. v. Ritter, 85 Ky. 368. See Contributory Negligence, chap. 25.

40. Chicago, etc., R. Co. v. Winfrey (Neb.), 93 N. W. 526.

41. People v. Douglass, 87 Cal. 281, 25 Pac. 417; Bryant v. Chicago, etc., R. Co., 53 Fed. 997.

42. Lake Erie & W. R. Co. v. DeLong, 109 Ill. App. 241.

43. Missouri, etc., R. Co. v. Huff, (Tex. Civ. App.), 81 S. W. 525, nor

the functions of such railway officers as ticket agents, conductors and drivers,<sup>44</sup> and passengers are presumed to know these functions,<sup>45</sup> and the regulations of the companies to which they trust themselves.<sup>46</sup> But there is no presumption that a passenger knew that he must give up his ticket before leaving a boat, having purchased the ticket on the boat.<sup>47</sup>

A carrier of passengers must be presumed to know that persons of all ages and conditions, strangers as well as those familiar with the surroundings, nearsighted people wearing glasses as well as those of perfect sight, are frequently among its passengers, and it is required to provide appliances, ways, and means adapted under the circumstances to the safe transportation of all such persons.<sup>48</sup> The fact that the issuance of a pass to a party was unlawful if he were not an employe of the carrier issuing the same raised the presumption that he was its employe.<sup>49</sup> Where plaintiff purchased a ticket from defendant steamboat company entitling her to ride by steamboat to a pier or landing at a park, and by trolley from the pier to the center of the park, there being no coupon or other statement on the ticket to indicate that any part of the contract was to be performed by any other carrier than the defendant, it

would any inference arise that the brakeman had authority to agree to carry passengers merely because his employer knew that such acts were done, as they might be done while the company was endeavoring to enforce rules forbidding such acts.

44. *Seamon v. Koehler*, 122 N. Y. 646, 33 St. Rep. (N. Y.) 729, 25 N. E. 353; *Dye v. Virginia Midland R. Co.*, 19 Wash. L. Rep. (D. C.) 369.

The authority of a brakeman to put a passenger off a train will not be presumed, but must be proved. *Illinois Cent. R. Co. v. Black*, 122 Ill. App. 439.

45. *Dye v. Virginia Midland R. Co.*, *supra*.

46. *Southern R. Co. v. Kendrick*, 40 Miss. 387, 90 Am. Dec. 332; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409; *Dye v. Virginia Midland R. Co.*, *supra*.

47. *Standish v. Narragansett Steamship Co.*, 111 Mass. 512, 15 Am. Rep. 66; *Griffith v. Cave*, 22 Cal. 534, 83 Am. Dec. 82.

48. *Great Falls, etc., R. Co. v. Hill*, 34 App. D. C. 304.

49. *Gill v. Erie R. Co.*, 135 N. Y. Supp. 355, 151 App. Div. 131, reargument and appeal to the Court of Appeals denied, 136 N. Y. Supp. 1135.

would be presumed that plaintiff was to be under defendant's care during the whole trip, and the burden was on defendant to show that such was not the fact, and that the trolley car was managed by another carrier, for whose negligence defendant was not responsible.<sup>50</sup> Where plaintiff's place of employment as a railroad inspector was changed to a town some distance from his home, and at the time of the change he was informed that his wages would be the same, but that he would be furnished free transportation between his home and his place of employment, such facts justified an inference that the passbook was a part of the consideration for his services, and that the carriage was not gratuitous.<sup>51</sup> In an action against a street railway by a passenger for injuries received through being struck by a missile thrown by a bystander, no presumption of negligence on the part of the defendant arises from the mere fact of the injury.<sup>52</sup> Where a stagecoach was overturned by striking a boulder, in turning back into the road after turning out, negligence of the driver is presumable.<sup>53</sup> The law will presume that a porter, employed and assigned by the Pullman Company to control the interior of a sleeping car, in which a passenger was riding, exercised such control with the assent of the railroad company.<sup>54</sup> It being common knowledge that the Boston Elevated Railway Company does not conduct an express or parcel delivery business, it is a reasonable inference that bundles in the doorway of a car belong to a passenger.<sup>55</sup>

### § 11. Presumptions as to contributory negligence.

The presumption of contributory negligence on the part of the person injured usually follows the rule as to the burden of proof.

50. *Clemmens v. Washington Park Steamboat Co.*, 162 Fed. 815.

51. *Eberts v. Detroit, etc., Ry.*, 151 Mich. 260, 14 Detroit Leg. N. 889, 115 N. W. 43.

52. *Woas v. St. Louis Transit Co.*, 198 Mo. 664, 96 S. W. 1017, 7 L. R. A. (N. S.) 231.

53. *Dinnigan v. Peterson*, 3 Cal. App. 764, 87 Pac. 218.

54. *Louisville & N. R. Co. v. Church*, 155 Ala. 329, 46 So. 457.

55. *Lyons v. Boston Elev. Ry. Co.*, 204 Mass. 227, 90 N. E. 419.

In jurisdictions where the burden is on the plaintiff to prove affirmatively his freedom from contributory negligence, the presumption, in the absence of proof, is that plaintiff was guilty of contributory negligence.<sup>56</sup> In those jurisdictions where the burden is not on the plaintiff to prove affirmatively his freedom from contributory negligence, but is on the defendant to prove such contributory negligence, if he would avail himself of that as a defence, the presumption, as a matter of course, in the absence of proof, is that plaintiff was not guilty of contributory negligence. The presumption thus raised in either case is rebutted when testimony to the contrary is presented sufficient to overcome such presumption.<sup>57</sup> In New York it has been held that, in an action to recover damages for an injury occurring through negligence, it is not to be presumed that plaintiff was free from fault,<sup>58</sup> and that no presumption exists, in the absence of proof, that an injured person was exercising due care at the time of the injury.<sup>59</sup> It has also been held in that State that, in the absence of proof of any circumstances importing negligence on the injured person's part, such negligence cannot be presumed.<sup>60</sup> And in a death case it was held that, in the absence of direct evidence of negligence on the part of the deceased, it may be presumed in his favor that he was desirous of preserving himself from injury.<sup>61</sup> In North Carolina, where the burden of proving freedom from contributory negligence is on the plaintiff, it is nevertheless held that the pre-

56. See cases cited from the states which hold the rule stated as to the burden of proof of contributory negligence, §§ 20 and 21, *post*.

57. See cases cited from the jurisdictions holding the rule stated as to the burden of proof as to contributory negligence, §§ 20 and 21, *post*.

58. Warner v. New York Cent. R. Co., 44 N. Y. 465.

59. Reynolds v. New York Cent., etc., R. Co., 53 N. Y. 248.

60. Button v. Hudson River R. Co., 18 N. Y. 248. See Massoth v. Delaware & Hudson Canal Co., 64 N. Y. 524, holding that there is no presumption of law that a person about to cross a railroad track in a vehicle driven by another fails to look for a train.

61. Morrison v. New York Cent., etc., R. Co., 63 N. Y. 643.

sumption is against contributory negligence, if there is no evidence of the fact, even in the absence of a statute making it a matter of affirmative defense.<sup>62</sup> The United States courts hold the same rule.<sup>63</sup> In other States where contributory negligence is a matter of affirmative defense it has been held that there are no presumptions against a plaintiff in an action for death or injuries resulting from negligence, of a want of due care and diligence, nor has he the burden of proving their exercise affirmatively;<sup>64</sup> that a woman will not be presumed to have been guilty of contributory negligence from the mere fact that she fell from the platform of a street car;<sup>65</sup> that it is not *prima facie* the fault of a passenger where he is injured by riding on the footboard of a trolley car;<sup>66</sup> that the presumption is that a person thrown from his load and fatally injured at a railroad crossing was exercising ordinary care and caution;<sup>67</sup> and that it must be presumed that a person who received injuries causing death, when no one saw the accident, was exercising due care, if there is no evidence to the contrary.<sup>68</sup>

## § 12. Presumption arising from instinct of self-preservation.

There seems to be a conflict of authority as to whether it should be presumed, in the absence of evidence, that a traveler, who was killed at a street crossing stopped, looked, and listened before crossing the track. In Kansas it has been held that "the very definition of ordinary care implies a presumption that it will usually be exercised. It is because people ordinarily, in crossing a railroad track, look and listen for their own protection, that a

62. Norton v. North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

63. Texas & P. R. Co. v. Gentry, 160 U. S. 353; Baltimore & Ohio R. Co. v. Griffith, 159 U. S. 603; Grand Trunk R. Co. v. Ives, 144 U. S. 408.

64. Bromley v. Birmingham M. R. Co. (Ala.), 11 So. 341.

65. Metropolitan R. Co. v. Snashall

(D. C. App.), 22 Wash. L. Rep. 377.

66. Elliott v. Newport St. R. Co. (R. I.), 23 L. R. A. 208, 28 Atl. 338, 18 R. I. 707.

67. Lillstrom v. Northern Pac. R. Co. (Minn.), 20 L. R. A. 587, 55 N. W. 624.

68. Reichla v. Gruenfelder, 52 Mo. App. 43.

failure to do so is held to be negligence. It can never be presumed in the absence of evidence that a person fails to do that which people ordinarily do to avoid injury.”<sup>69</sup> In an Illinois case the court said: “The rule in this State undoubtedly is that in suits for personal injuries caused by the negligence of another, the plaintiff must allege and prove that he was at the time in the exercise of due care, and, when the action is for causing the death of another, the burden is upon the administrator to show that the deceased exercised ordinary care to avoid the injury.”<sup>70</sup> But in the latter class of cases and especially where no one saw the killing, direct testimony as to such care is not necessary, but it may be inferred from the circumstances of the case as shown by the evidence.<sup>71</sup> In a Pennsylvania case the court said: “The common law presumption is that everyone does his duty until the contrary is proved, and in the absence of all evidence on the subject, the presumption is that the decedent observed the precautions which the law prescribed. In the case at bar, no witness was called who saw the occurrence. There is no evidence whatever whether in fact the decedent did stop, and look, and listen. The presumption is that he did. Proof of that fact was no part of the plaintiff’s case. The presumption is of fact merely, and may be rebutted, but we are without evidence on the subject.”<sup>72</sup> In New York it has been held that the burden of proof is on the plaintiff to show that in approaching a railroad crossing he looked and listened for the approaching train. The court said, “In the case of a death by accident at a railroad crossing it must often happen that the circumstances immediately preceding it, and the acts and conduct of the deceased, are left in great obscurity. But the rules of law governing the right of recovery are the same as in other cases,

69. *Chicago, R. I. & P. Ry. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993; *Dewald v. Railway Co.*, 44 Kan. 587, 24 Pac. 1101. And see *McBride v. Northern Pac. R. Co.*, 19 Oreg. 64, 23 Pac. 814.

70. *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358.

71. *Chicago & A. R. Co. v. Cary*, 115 Ill. 115, 3 N. E. 519.

72. *Schum v. Pennsylvania R. Co.*, 107 Pa. St. 8, 52 Am. Rep. 468.

although slighter evidence of compliance with the duty cast upon a plaintiff might be deemed sufficient than where the injured person was alive and competent to testify.”<sup>73</sup> In a recent Iowa case the court said: “The origin of the rule in this State as to the presumption of action dictated by the instinct of self-preservation is due to the doctrine that the burden of showing affirmatively freedom from contributory negligence is on the plaintiff, and was introduced in order to avoid the evident injustice of such a doctrine in cases where there was no evidence whatever one way or the other as to the exercise of care by the injured party, and no such evidence was obtainable by reason of the death of the party injured, and absence of any proof as to the circumstances attending the injury. The rule has no application where there is direct evidence of contributory negligence at the instant of the accident.”<sup>74</sup> It has never been held that the presumption from the instinct of self-preservation constitutes affirmative proof of any specific act, or the exercise of any specific care.<sup>75</sup> In view of the fact that the rule generally applied to the conduct of persons crossing the tracks of steam railroads that the omission to “stop, look, and listen” before crossing the tracks is negligence, as matter of law, is only applicable to street railways where the attendant circumstances are such that reasonable care and prudence would dictate such precautions, and the mandatory duty to look and listen is not applied with the same rigidity to pedestrians crossing street railroad tracks at the intersecting streets, it being the duty of the railroad company to have its cars under control as they approach such crossings, it would seem that where there is no evidence upon the question as to whether a person who was killed at

73. *Rodrian v. New York, etc., R. Co.*, 125 N. Y. 526, 26 N. E. 741.

74. *Ames v. Waterloo, etc., R. T. Co.*, 1 St. Ry. Rep. 199 (Iowa), 95 N. W. 161; *Bell v. Incorporated Town of Clarion*, 113 Iowa, 126.

75. *Ames v. Waterloo, etc., R. T.*

*Co., supra*; *Metz v. St. Paul City R. Co.* (Minn.), 92 N. W. 502; *McGee v. Consol. St. R. Co.*, 102 Mich. 107; *Watkins v. Union Tract. Co.*, 194 Pa. St. 564; *Nugent v. Tract. Co.*, 181 Pa. St. 160.

a street railroad crossing looked and listened before crossing the track, that the presumption would be even stronger in favor of his having taken the necessary precautions to prevent injury.

The presumption that the decedent who was killed at a crossing performed his legal duty of stopping, looking, and listening is rebutted when it appears from the evidence that he stopped on the track immediately in front of an approaching locomotive.<sup>76</sup> If a person about to cross a track could have seen an approaching train if he had stopped and looked, it will be presumed, in the absence of contradictory evidence, that he did not look, or that, if he did look, he did not heed.<sup>77</sup>

**§ 13. Presumptions and burden of proof where injury is caused by sudden jerks or sudden or premature starting of the car.**

In an action for injuries to a passenger, while attempting to board a street car, by the alleged premature starting thereof, there is no presumption of liability from the mere fact of injury; the burden being on plaintiff to establish that his injury resulted from defendant's negligence.<sup>78</sup> Where a street car passenger claims damages for an injury alleged to have resulted by the premature starting of the car as she was endeavoring to alight, there was no presumption of negligence, on the part of the defendant, arising from the mere fact that the passenger was injured while alighting from the car;<sup>79</sup> the burden of proving negligence being on the party asserting it.<sup>80</sup> Where it appears, in an action by a passenger

76. *Pennsylvania R. Co. v. Moody*, 126 Pa. St. 244, 17 Atl. 590; *Bellefontaine R. Co. v. Schneider*, 24 Ohio St. 670.

77. *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180; *Myers v. Baltimore & O. R. Co.*, 150 Pa. St. 386, 24 Atl. 747; *Miller v. Truesdale*, 56 Minn. 274, 57 N. W. 661; *Kallmerten v. Cowen*, 111 Fed. 297, 49 C. C. A. 746.

78. *File v. Wilmington City Ry. Co.* (Del. Super.), 80 Atl. 623.

79. *Coyle v. People's Ry. Co.* (Del. Super.), 80 Atl. 638; *Elliott v. Wilmington City Ry. Co.*, 6 Pen. (Del.) 570, 73 Atl. 1040.

80. *Freeman v. Wilmington, etc., Traction Co.* (Del. Super.), 80 Atl. 1001; *Benson v. Wilmington City Ry. Co.*, 1 Boyce (24 Del.), 202, 75 Atl. 793.



against a street car company, that the street car was stopped by the motorman so suddenly as to throw the passenger forward against the seat in front of him, there is a presumption of negligence in operation of the car calling for an explanation by the company.<sup>81</sup> Where a street car passenger was injured in alighting from a street car by his feet becoming entangled in the end of a trolley rope negligently left lying on the floor of the car without the passenger's knowledge, the doctrine *res ipsa loquitur* was not rendered inapplicable because the passenger was not passive or under the absolute control of the carrier, but was attempting to alight; that doctrine being applicable where the passenger is making a voluntary movement, and the injury is caused by something absolutely either in the position or condition of the carrier's appliances, or in the management of the means of transportation.<sup>82</sup> In an action for injuries to a passenger on a street car by a premature start as she was about to alight, the burden was on plaintiff to show affirmatively that defendants had knowledge that she desired to alight or of such facts as to make them alert as to whether she desired to do so.<sup>83</sup> Mere injury to a passenger while aboard a car or while alighting from it creates no presumption that it was caused by negligence of the carrier operating the car; but it must be first shown that the injury came from the movement of the car by those in charge of it, or from something connected therewith, or in control of the carrier, and then it is presumed that the thing causing the injury was due to the carrier's negligence, throwing on it the burden of disproving the *prima facie* case.<sup>84</sup> A jerk of a cable car which is a frequent incident in the operation of such cars, and consistent with care and proper equipment, does not raise any presumption of negligence.<sup>85</sup> Where the

81. *Tilton v. Philadelphia Rap. Trans. Co.*, 231 Pa. 63, 79 Atl. 877.

82. *Denver City Tramway Co. v. Hills*, 50 Colo. 328, 116 Pac. 125.

83. *Masterson v. Crosstown St. Ry.*

*Co. of Buffalo*, 201 N. Y. 499, 94 N. E. 1086, rev'g judg. 120 N. Y. Supp. 1134, 136 App. Div. 908.

84. *Wyatt v. Pacific Electric Ry. Co.*, 156 Cal. 170, 103 Pac. 892.

85. *De Yoe v. Seattle Electric Co.*,

declaration contains a general charge of negligence, and there is evidence that plaintiff was a passenger and that an accident happened, if the accident and circumstances attending it are so unusual and of such nature that it could not well have happened without defendant's negligence, the doctrine *res ipsa loquitur* applies; but, where the proof shows that it happened in no unusual way, as from a sudden lurching or jerking of a car, the burden of proof is on the plaintiff to establish the negligence charged.<sup>86</sup> Whenever something unusual occurs in the operation of a public conveyance carrying passengers for hire, as where a cable car on which plaintiff was riding made an unusual and violent stop, so that the glass in the windows was shattered and plaintiff was thrown against a stove, and another passenger was thrown against a window with such force as to break the glass and bend the protecting bars, proof of such facts and of a consequent injury to a passenger raises the presumption of negligence.<sup>87</sup> Where a passenger in a crowded summer car by its sudden movement is thrown beyond the guard rail and his head is struck by a car on the other track, but there is no injury to the car in which the passenger is riding, no presumption of negligence arises from the mere happening of the accident.<sup>88</sup> Where, in an action for injuries to a passenger while attempting to board a street car, the evidence showed that plaintiff was injured by the jerking forward of a car on a designated avenue in a city, but there was no evidence as to whose car it was or by whom it was operated, and, so far as the evidence disclosed, any company other than defendant might have owned or operated the

53 Wash. 588, 102 Pac. 446, judg. aff'd 104 Pac. 647.

*Res ipsa loquitur* as applied to carriers is based on the apparent fact that the accident could not have happened without the carrier's negligence, or, on the literal meaning of the expression that the thing itself speaks,

and shows *prima facie* that the carrier was negligent. Id.

86. Beatty v. Metropolitan West Side Elev. R. Co., 141 Ill. App. 92.

87. Briscoe v. Metropolitan St. Ry. Co., 222 Mo. 104, 120 S. W. 1162.

88. Cline v. Pittsburg Rys. Co., 226 Pa. 586, 75 Atl. 850, 27 L. R. A. (N. S.) 936.

car, plaintiff could not recover.<sup>89</sup> Where at a station a vestibule door of a train was opened and passengers alighted therefrom, and as a passenger was attempting to board the train through such door, and while he was on the lower step, the door was closed, and the train was started at the same time, it may, in the absence of evidence to the contrary, be inferred that it was closed by some one connected with the operation of the train.<sup>90</sup>

Where plaintiff, suing for injuries received while alighting from a street car, testified that when the car stopped he started to step down to the pavement, and that while making the last step the car suddenly started forward, throwing him down on his left side, but he did not state, nor was he asked on cross-examination, whether he had hold of the handhold with his left hand, in which case defendant's counsel admitted he might have been thrown on the left side, it was held that the court could not be asked to presume that he did not grasp the handhold in his left hand, and hence hold that his testimony was inconsistent with physical facts, and must be disregarded.<sup>91</sup> A jolt, which was sufficient to cause a street car passenger to be lifted from her seat and fall, and cause the forward part of the car to rise up on one side, unexplained, is presumptive evidence of negligence, not being an ordinary incident of street car travel.<sup>92</sup> Where plaintiff, a mail clerk on defendant's train, was injured while attempting to alight at what he believed was the final stop of the train by a sudden movement thereof without warning, plaintiff being a passenger, there was a presumption arising from the circumstances surrounding the accident that defendant was negligent.<sup>93</sup> Proof that a street car was negligently started with a sudden jerk before a passenger had taken a seat in such a manner as to violently throw the passenger against the side of a seat made a *prima facie* case of actionable negligence, provided the

89. *Reisenleiter v. United Rys. Co. of St. Louis*, 155 Mo. App. 89, 134 S. W. 11.

90. *Rainey v. Grand Trunk Ry. Co. of Canada*, 84 Vt. 521, 80 Atl. 723.

91. *Berry v. Metropolitan St. Ry. Co.*, 156 Mo. App. 560, 137 S. W. 602.

92. *Webber v. Old Colony St. Ry. Co.*, 210 Mass. 432, 97 N. E. 74.

93. *Houston & T. C. Ry. Co. v. Keeling* (Tex. Civ. App.), 142 S. W. 103.

passenger used due care.<sup>94</sup> Where a coach standing in a yard was occupied by passengers, and the carrier with knowledge thereof moved the car with such violence as to hurl the passengers to the floor or against the arms of the chairs occupied by them, causing injury, the carrier was *prima facie* negligent, and the burden rested on it to show the circumstances that would exonerate it.<sup>95</sup> While a passenger fell and was injured while entering a train by the moving of the train, the presumption is that the injury was due to the negligence of the carrier.<sup>96</sup> The sudden starting of a street car with a jerk of sufficient violence to throw to the ground a passenger, who had placed her foot on the running board to alight at the crossing which the car was slowly approaching, justifies an inference of negligence.<sup>97</sup> Where a passenger on defendant's train was thrown against one of the seats and injured by a sudden stoppage of the train, such evidence, in the absence of explanation by defendant, was *prima facie* to be attributed to defendant's negligence, under the doctrine *res ipsa loquitur*.<sup>98</sup> Where, in an action against a street railway company for injuries to a passenger, plaintiff testified that she had stood up preparatory to alighting, and signaled the conductor, when the car gave a sudden jerk that "knocked her somewhere," after which she had no further remembrance, and it appeared that she had received traumatic injuries, the evidence was sufficient to raise a presumption of negligence.<sup>99</sup> Where a street car passenger was injured by the alleged premature starting of the car as she was endeavoring to alight, proof that the car was

94. *Brady v. Springfield Traction Co.*, 140 Mo. App. 421, 124 S. W. 1070.

95. *Missouri, etc., Ry. Co. of Texas v. Stone* (Tex. Civ. App.), 125 S. W. 587.

96. *St. Louis, etc., Ry. Co. v. Stell*, 87 Ark. 303, 112 S. W. 876. See *St. Louis, etc., Ry. Co. v. Fambro*, 88 Ark. 12, 114 S. W. 230. as to presumption under the statute.

97. *Paducah Traction Co. v. Baker*, 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N. S.) 1185.

98. *Todd v. Missouri Pac. Ry. Co.*, 126 Mo. App. 684, 105 S. W. 671.

99. *Lomas v. New York City Ry. Co.*, 188 N. Y. 628, 81 N. E. 1169, order, 97 N. Y. Supp. 658, 111 App. Div. 332, aff'd.

brought to a full stop to discharge and receive passengers, that it suddenly started while plaintiff was stepping to the street, and that she was injured in consequence of a fall caused by the starting of the car, was sufficient to raise a presumption that the starting of the car was due to negligence. A carrier's negligence cannot be found from the bare fact that there was an unusual lurch of the car, and that injury to a passenger resulted. The passenger, to recover, must show, by evidence of what the motorman did, or what occurred, that the motorman was negligent.<sup>2</sup> The burden was on plaintiff, a passenger, to prove the unusual character of the jerk of the car; a street railway company being liable only for the negligent operation of its cars.<sup>3</sup> Whether a jerk of a car, whereby a passenger was injured, will sustain a charge of negligence depends on the violence of the jerk, the situation of the passenger at the time, and the carrier's duty to know that situation.<sup>4</sup> A jerk or jar causing a passenger's injuries is to be assumed to have been an ordinary one, and not one caused by negligence, in the absence of proof of negligence.<sup>5</sup> Where a street car which had stopped to receive passengers at a regular place starts in the usual way before

1. *Bell v. Central Elec. Ry. Co.*, 125 Mo. App. 660, 103 S. W. 144, and the carrier's liability for the injuries sustained was fixed, unless it could show affirmatively that, notwithstanding the existence of such facts, the starting of the car was the result of unavoidable accident or some cause beyond its control.

Operators of a street car who make a sudden start of the car of sufficient violence to injure a passenger proceeding with reasonable care to reach a place of security are presumptively negligent, and the presumption becomes conclusive unless it is shown that the manner of starting the car was unavoidable in the exercise of the highest degree of care. *Miller v. Met-*

*ropolitan St. Ry. Co.*, 125 Mo. App. 414, 102 S. W. 592.

2. *Young v. Boston & N. St. Ry. Co.*, 213 Mass. 267, 100 N. E. 541.

The mere fact that a car was started with a sudden jerk will not of itself warrant a finding that an accident to an embarking passenger was due to the negligence of the motorman. *Martin v. Boston Elev. Ry. Co.* (Mass.), 101 N. E. 1089.

3. *Sanson v. Philadelphia Rap. Transit Co.*, 239 Pa. 505, 86 Atl. 1069.

4. *Birmingham Ry., etc., Co. v. Mayo* (Ala.), 61 So. 289.

5. *Wile v. Northern Pac. Ry. Co.*, 72 Wash. 82, 129 Pac. 889.

The doctrine *res ipsa loquitur* ap-

the passengers has an opportunity to reach a place of safety, it may be inferred that it started by the acts of the street car employes.<sup>6</sup> Where a passenger suing for a personal injury alleged to have been caused by the negligence of the trainmen shows an unusual and violent jerk of the train and resulting injury, he establishes a *prima facie* case within the maxim *res ipsa loquitur*.<sup>7</sup>

#### § 14. Presumption where person injured is passenger on freight train.

Where a passenger on a freight train is injured as the result of a sudden jerk, the doctrine *res ipsa loquitur* does not obtain so as to require the carrier to acquit itself of negligence, in the absence of proof that the jerk was extraordinary and unusual.<sup>8</sup> The mere fact that a person, in attempting to board a moving freight train, is thrown off by the jerk of the train, does not warrant the conclusion of defective track or train appliances or negligent operation, and hence the doctrine *res ipsa loquitur* does not apply.<sup>9</sup> The same presumptions arise in favor of a passenger injured on a freight train, while obeying the regulations of the company, as in the case of a passenger on any other train.<sup>10</sup> One claiming that he was injured while riding on a freight train as a passenger must show that the railway company allowed such trains to carry passengers.<sup>11</sup> The fact that a sudden and violent jolt or jar accompanies the stopping of a freight train will not raise *ipso facto* a presumption

plies to a passenger's injury only where the act causing it would not ordinarily happen without negligence; and hence did not apply to an accident from a jerk or jar not shown to have been caused by negligence. *Id.*

6. *Killam v. Wellesley & B. St. Ry. Co.* (Mass.), 101 N. E. 374.

7. *Sever v. Minneapolis & St. L. Ry. Co.* (Iowa), 137 N. W. 937.

8. *Tickell v. St. Louis, etc., Ry. Co.*, 149 Mo. App. 648, 129 S. W. 727, negligence is presumed where person is

injured in an accident while traveling as a passenger in the caboose of a freight train, *Georgia Pac. Ry. Co. v. Love*, 91 Ala. 432, 8 So. 714, 24 Am. St. Rep. 927; *Norton v. St. Louis & H. Ry. Co.*, 40 Mo. App. 642.

9. *Ray v. Chicago, etc., Ry. Co.*, 147 Mo. App. 332, 126 S. W. 543.

10. *Woolery v. Louisville, etc., Ry. Co.*, 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114.

11. *Texas & P. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

of negligence.<sup>12</sup> In an action by a passenger for injuries sustained while riding in a caboose, the fact that it was derailed while riding thereon would, at most, be only presumptive evidence of some negligent act or omission by the carrier.<sup>13</sup> Plaintiff's testimony that the conductor was in charge of the train, and was giving orders in connection therewith, and had authority over the train, and went with plaintiff to the engine, does not show authority on the part of the conductor to waive a written contract providing that plaintiff "shall, while the train is in motion, ride in the caboose attached to the train conveying the stock," since to prove such a waiver, it rested on plaintiff to affirmatively show that it was within the apparent scope of the conductor's authority to waive the benefit of the contract, and that plaintiff did not know or have reasonable grounds to believe that the conductor was exceeding his authority.<sup>14</sup>

### § 15. Where injuries are caused by explosion or electric shock.

In an action for injuries from an electric shock to a passenger while on defendant's electric car, the fact of the injury raises a presumption that the defendant was negligent.<sup>15</sup> Where defendant's street car, on which plaintiff was a passenger, was proceeding at such speed that it might have been quickly stopped and in a

12. Hawk v. Chicago, etc., Ry. Co., 130 Mo. App. 658, 108 S. W. 1119.

The fact that a passenger on the seat running lengthwise of the caboose, with his face turned toward the door, was thrown therefrom to the floor by a jolt accompanying the stopping of the train, is insufficient to raise a presumption of negligence. *Id.*

The *res ipsa loquitur* doctrine applies to an injury received by a passenger on a freight train where cars were coupled so violently that he was thrown from a trunk on which he was sitting in the caboose, through a side

door, to the ground, a water keg in the car was overturned, etc. Mitchell v. Chicago & A. Ry. Co., 132 Mo. App. 143, 112 S. W. 291. See also, Russell v. Quiney, etc., R. Co., 125 Mo. App. 441, 102 S. W. 613.

13. McLean v. Atlantic Coast Line R. Co., 81 S. C. 100, 61 S. E. 900.

14. Illinois Cent. R. Co. v. Jennings, 229 Ill. 608, 82 N. E. 403.

15. McDonough v. Boston Elev. Ry. Co., 208 Mass. 436, 94 N. E. 809, and the attempt of a passenger to explain the reason of the accident did not prevent him from relying on the doctrine *res ipsa loquitur*.

short distance, and was completely wrecked—as to the forward part—by an explosion conceded to have been caused by dynamite, and there was no evidence whatever that defendant or its servants had special information of such unusual danger, or could have obtained it by the exercise of that high degree of care exacted of carriers, the happening of the explosion was not evidence of negligence.<sup>16</sup> That an explosion occurs in the controller box of a street car, which, up to the time of the explosion, was running smoothly, is not, under the doctrine *res ipsa loquitur*, a showing of gross negligence on the part of the operatives of the car.<sup>17</sup> Where plaintiff was injured by an explosion from the controller of defendant's street car, and the evidence of an expert was that the accident could not have occurred from any other cause than a defect in the condition of the electric mechanism and equipment of the car, and there was no evidence to warrant the finding that such an accident could have happened from any other cause, a case for the application of the doctrine *res ipsa loquitur* is presented.<sup>18</sup> Where, in an action for injuries to a street car passenger, the complaint charges negligence in the care and operation of the controllers, whereby fire was produced, alarming plaintiff and causing her to jump from the car while in motion, the acts of negligence are such as legal inference tend to establish, and plaintiff is not deprived of her right to rely on the doctrine *res ipsa loquitur*.<sup>19</sup> Where a passenger on a street car was injured by stepping on an electrified metal plate in defendant's car, and receiving an electric shock, the burden was on defendant to show that the presence of the electricity could not have been detected and prevented by the exercise of the highest degree of care.<sup>20</sup> Where an explosion occurred in the controller box of a street car, and flames issued therefrom which extended

16. *Bigwood v. Boston & N. St. Ry. Co.*, 209 Mass. 345, 95 N. E. 751.

17. *Martin v. Boston & N. St. Ry. Co.*, 205 Mass. 16, 91 N. E. 159.

18. *Beattie v. Boston Elev. Ry. Co.*, 201 Mass. 3, 86 N. E. 920.

19. *Louisville & S. I. Traction Co. v. Worrell*, 44 Ind. App. 480, 86 N. E. 78.

20. *McRae v. Metropolitan St. Ry. Co.*, 125 Mo. App. 562, 102 S. W. 1032.



nearly to the roof of the car, frightening plaintiff so that he jumped from the car and was injured, the burden was on the carrier to establish absence of negligence in order to relieve itself from liability.<sup>21</sup> Proof of the explosion of the controller of a street car, resulting in injury to a passenger, is *prima facie* proof of the company's negligence; and, to defeat a recovery, it must show its freedom from negligence.<sup>22</sup> Where the electrical disturbance on an electric railway passenger car resulting in injury to a passenger was abnormal, the happening of the accident was sufficient evidence of negligence to require a showing of due care by the carrier.<sup>23</sup>

### § 16. Injuries to passenger in elevator.

Where, in an action for injuries to an elevator passenger, defendant showed by a mechanic in charge of the elevator his daily inspection thereof and the machinery, and experts showed that they had made inspection at reasonable intervals, with a view to certify to the sufficiency and structural soundness of the elevator, the evidence overcame the inference of negligence of defendant in maintaining unsuitable and defective appliances.<sup>24</sup> Where, in an action for injuries to a passenger in an elevator through the falling thereof, plaintiff was entitled to go to the jury on the presumption of negligence, an instruction that the burden of proving the specific facts causing the injury rested throughout the case on the plaintiff was properly refused.<sup>25</sup> The fact that a passenger elevator used to carry persons from floor to floor in a store building fell when persons were being carried thereon is evidence that the ele-

21. *Paine v. Geneva, etc., Traction Co.*, 101 N. Y. Supp. 204, 115 App. Div. 729.

22. *Gay v. Milwaukee Ry., etc., Co.*, 138 Wis. 348, 120 N. W. 283.

23. *Blumenthal v. Brooklyn Union Elev. R. Co.*, 143 N. Y. Supp. 811.

24. *Cohen v. Farmers' Loan & Trust Co.*, 127 N. Y. Supp. 561, 70 Misc. Rep. 548, holding also that

where an elevator passenger, injured by the fall of the elevator, showed facts justifying an inference of defendant's negligence, defendant could show due care, and could also show the cause of the accident, to rebut the negligence.

25. *Orcutt v. Century Bldg. Co.*, 214 Mo. 35, 112 S. W. 532.

vator was mismanaged, or was out of repair, or of faulty construction, authorizing a recovery.<sup>26</sup> Where an elevator is stopped and its door opened to permit the entry of a passenger, and the operator starts it while the passenger is entering, so that the passenger is injured, there is a presumption of negligence, rendering the operator's employer liable for the injury.<sup>27</sup> Where, in an action for injuries received while a passenger on an elevator, the evidence showed that plaintiff stepped into the elevator; that there was no person in the elevator to run it, and, that immediately upon her stepping in, the elevator began to descend and she was injured in attempting to get out, plaintiff was not required to show what might have caused the elevator to descend, nor to show that certain things did not cause it to do so, but was only required to show what did cause its descent, and the burden of showing that contributory negligence of plaintiff caused the elevator to descend is on defendant.<sup>28</sup> An injury to a passenger on a passenger elevator raises a presumption of the negligent failure of the owner of the elevator to exercise the ordinary diligence required of him.<sup>29</sup>

Where a passenger elevator controlled by defendant fell several stories and was stopped with a sharp jerk, negligence may be inferred by the jury on the theory of *res ipsa loquitur*.<sup>30</sup> Where there is no evidence as to the acts of the operator of an elevator which, while in good working condition, suddenly moved upward while plaintiff was attempting to enter it and then descended on his foot, it will be presumed, in the absence of an explanation, that the operator was negligent.<sup>31</sup> A presumption arises against the owner and operator of a passenger lift in a building, in favor of

26. *Steiskal v. Marshall Field & Co.*, 238 Ill. 92, 87 N. E. 117, affg. 142 Ill. App. 154.

27. *Wagner v. Farmers' & Merchants' Ins. Co.*, 90 Neb. 463, 133 N. W. 650.

28. *Cooper v. Century Realty Co.*, 224 Mo. 709, 123 S. W. 848.

29. *Helmly v. Savannah Office Bldg Co.* (Ga. App.), 79 S. E. 364.

30. *Kelly v. Lewis Inv. Co.* (Or.), 133 Pac. 826.

31. *Harvey v. Proctor*, 142 N. Y. Supp. 769.

a person injured while in transportation under ordinary conditions.<sup>32</sup>

**§ 17. Presumption as to carrier's knowledge of violation of its rules.**

If the practice to violate the rule of a common carrier is continued for such a length of time that the carrier might reasonably have known of it, the knowledge of the carrier as to such violation will be presumed.<sup>33</sup>

**§ 18. Statutory regulations.**

Under the laws of Pennsylvania, no presumption of negligence by a carrier arises from mere proof of injury to a passenger, negligence being presumed only where a passenger is injured by some act or omission of the carrier or its employes, or by something connected with the appliances of transportation; but the burden of showing negligence still remains upon the passenger where such circumstances are as consistent with due care as with negligence.<sup>34</sup>

Under Georgia Civ. Code 1895, §§ 2266, 2321, creating a presumption of negligence against a railroad in an action for injuries to a passenger, and requiring carriers of passengers to use extraordinary diligence, defendant, in order to rebut such presumption, must prove that its servants exercised extraordinary care in connection with those things in which negligence is charged.<sup>35</sup>

Upon proof of injury to a passenger of a railroad company by the running of its locomotives, cars, or other machinery, or by any person in its employment, there is a presumption of the railroad company's negligence, under Georgia Civ. Code, § 2780, providing that a railroad company shall be liable for damage to persons by

32. *Burdette v. Chicago Auditorium Ass'n*, 166 Ill. App. 186.

33. *Coburn v. Moline, etc., Ry. Co.*, 149 Ill. App. 132, judg. affd. 243 Ill. 448, 90 N. E. 741.

34. *Pittsburg, etc., Ry. Co. v. Grom*, 142 Ky. 51, 133 S. W. 977.

35. *Georgia Ry., etc., Co. v. Gilleland*, 133 Ga. 621, 66 S. E. 944. See also, *Smith v. Atlantic Coast Line R. Co.*, 5 Ga. App. 219, 62 S. E. 1020, as to construction of Civ. Code, § 2321.

the running of the locomotives, cars, or other machinery of such company, unless the company shall make it appear that their agents had exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company; and as such section must be construed with section 2714, providing that a carrier of passengers is bound to extraordinary diligence to protect its passengers, but is not liable for injuries to the person after having used such diligence, so that the phrase "reasonable care and diligence," in section 2780, must be deemed to mean "extraordinary" care and diligence, the presumption of negligence is not rebuttable by a showing that the railroad company exercised only ordinary care and diligence.<sup>36</sup> Under Louisiana Civ. Code, art. 2315, in an action by a passenger against a railroad for damages resulting from an accident, plaintiff must prove the negligence of the defendant.<sup>37</sup> Under Florida Gen. St. 1906, § 3148, a presumption of negligence arises against a railroad company on proof of personal injury or property lost, caused by the running of the train and proof of the ultimate fact that caused the injury or loss.<sup>38</sup>

Under Kirby's Arkansas Dig., § 6773, charging railroad companies with responsibility for injuries to persons by the running of trains, the *prima facie* case established by evidence that plaintiff was injured by the operation of defendant's railroad train was not limited to the railroad's failure to obey section 6607, requiring railroads to keep a vigilant lookout, but extended to all injuries caused by the operation of the train.<sup>39</sup>

36. *Doughitt v. Louisville & N. R. Co.*, 136 Ga. 351, 71 S. E. 470.

Where the engineer caused the train to give a sudden jerk forward, whereby plaintiff was thrown to the ground and hurt, while he was in the act of alighting, a presumption of negligence attached to the carrier. *Pierce v. Georgia R., etc., Co.*, 9 Ga. App. 666, 72 S. E. 66.

37. *Marsalis v. Louisiana & N. W. R. Co.*, 129 La. 146, 55 So. 744. See

also, *McGinn v. New Orleans Ry., etc., Co.*, 118 La. 811, 43 So. 450.

38. *Warfield v. Hepburn*, 52 Fla. 409, 57 So. 618. See also, *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 So. 318, as to presumption that a passenger injured by the operation of a railroad was injured through the negligence of the road, under Laws 1891, p. 113, c. 4071.

39. *Kansas City Southern Ry. Co. v. Davis*, 83 Ark. 217, 103 S. W. 603.

### § 19. The burden of proving negligence.

The burden of proof is upon plaintiff, as a general rule, to prove, in an action to recover damages for a personal injury sustained, the negligence of the carrier, and in the absence of any presumption of negligence on the part of the defendant, the plaintiff must prove by a fair preponderance of the evidence facts which show that the negligence of the defendant was the proximate cause of the injury.<sup>40</sup> Having done this, the plaintiff is entitled to recover, except where the rule of law is maintained that plaintiff also has the burden of proving his own freedom from contributory negligence.<sup>41</sup> But the plaintiff is not bound to make out his case beyond all reasonable doubt, or so as to exclude every other possible theory.<sup>42</sup> It is necessary for plaintiff to establish by a preponderance of evidence circumstances

40. *Searles v. Manhattan R. Co.*, 101 N. Y. 661, 25 Am. & Eng. R. Cas. 358; *Cordell v. New York Cent., etc., R. Co.*, 75 N. Y. 330; *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75, 18 Am. & Eng. R. Cas. 162; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 292; *Oysterbank v. Gardner*, 49 N. Y. Super. Ct. 263; *McCaig v. Erie R. Co.*, 8 Hun (N. Y.), 599; *Cox v. Wilmington City R. Co. (Del.)*, 53 Atl. 569; *Pennsylvania, etc., R. Co. v. Spearen*, 47 Pa. St. 300; *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236; *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 524; *Cleveland, etc., R. Co. v. Troesch*, 68 Ill. 545; *Allyn v. Boston, etc., R. Co.*, 105 Mass. 77; *Brown v. Congress, etc., St. R. Co.*, 49 Mich. 153; *Chicago, etc., R. Co. v. Smith*, 46 Mich. 504; *Willoughby v. Chicago, etc., R. Co.*, 37 Iowa, 432; *Button v. Frink*, 51 Conn. 342; *Herschberger v. Lynch*, 11 Atl. Rep. (Pa.)

642; *Mynning v. Detroit, etc., R. Co.*, 67 Mich. 677; *Chicago, etc., R. Co. v. Felton*, 125 Ill. 458; *Chicago, etc., R. Co. v. Mock*, 88 Ill. 87; *Hewes v. Philadelphia, etc., R. Co.*, 76 Md. 154; *Crandall v. Goodrich Transp. Co.*, 16 Fed. 75; *Allen v. Willard*, 57 Pa. St. 374; *Chicago, etc., R. Co. v. Trotter*, 61 Miss. 417; *Herstine v. Lehigh Valley R. Co.*, 151 Pa. St. 244.

41. The burden of proving the absence of contributory negligence is placed upon the plaintiff in a number of States. See § 13, *post*, and cases there cited.

42. *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562; *Whitney v. Clifford*, 57 Wis. 156; *Welch v. Jugenheimer*, 56 Iowa, 11, 41 Am. Rep. 77; *Elliot v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Stratton v. Central City Horse R. Co.*, 95 Ill. 525, 1 Am. & Eng. R. Cas. 115.

from which it may be inferred that there is a reasonable probability that the accident resulted from the want of ordinary care, or negligence, of the defendant, or that it could not have been produced except by the operation of abnormal causes.<sup>43</sup> The plaintiff must prove something which warrants the inference of negligence on the defendant's part, and not leave his case upon facts just as consistent with care and prudence as with the opposite, or so that there may not appear reasonable grounds upon which to impute negligence to the defendant.<sup>44</sup> It is not necessary to prove every act of negligence charged or every material fact alleged by the plaintiff, but the jury need only be satisfied by a preponderance of the evidence of the negligence of the defendant.<sup>45</sup> When plaintiff has introduced evidence sufficient, as a matter of law, to charge the defendant with negligence, or has shown facts sufficient to create a presumption of negligence, the burden of proof shifts to the defendant.<sup>46</sup> Where the plaintiff is a passenger on a street car, a *prima facie* case of negligence is made out by showing the happening of the accident during the course of transportation; and, if the injury was caused by apparatus wholly under its control, furnished and applied by it, a presumption of negligence on the part of the company is raised, and the burden is on the latter to prove itself not guilty of negligence.<sup>47</sup> But, where the agencies which, united, caused an injury to a passenger, were not all within the control

43. *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 241; 15 Am. & Eng. R. Cas. 394; *Philadelphia v. Stebbing*, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; *Seybolt v. New York, etc., R. Co.*, *supra*.

44. *Hayes v. Forty-second St., etc., R. Co.*, 97 N. Y. 259; *McCaig v. Erie R. Co.*, 8 Hun (N. Y.), 599.

45. *Johnson v. Agricultural Ins. Co.*, 25 Hun (N. Y.), 251; *Pittsburgh, etc., R. Co. v. Gray*, 59 N. E. (Ind. App.) 1000; *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562.

46. *Pennsylvania Canal Co. v. Bentley*, 66 Pa. St. 30; *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311; *Bischoff v. Schultz*, 5 N. Y. Super. Ct. 757; *Giles v. Diamond State Iron Co.*, 8 Atl. Rep. (Del.) 368.

47. *Chicago City Ry. Co. v. Morse*, 93 Ill. App. 662, *affd.* 197 Ill. 327, 64 N. E. 304; *Brimer v. Illinois Cent. R. Co.*, 101 Ill. App. 198; *Davis v. Paducah Ry. & Light Co.*, 24 Ky. Law Rep. 135, 68 S.W. 140; *Chicago City Ry. Co. v. Carroll*, 102 Ill. App. 202.

of the carrier, the burden of proof is on the plaintiff to show the negligence of the defendant which caused the injury, since in such case negligence could not be inferred from the mere fact of injury.<sup>48</sup> In an action for personal injuries sustained by the plaintiff by his being thrown from a street car on its jumping the track, the plaintiff made a *prima facie* case by proof that the car was going at a "pretty good rate," and that the accident happened at a point where there were side tracks leading into the car stable; the burden nevertheless remained on him, when the proof was all in, to show negligence on the part of the defendant.<sup>49</sup> A common carrier can only rebut the presumption that an injury to its passengers from an accident to its conveyance was due to its negligence, by showing that the accident occurred from circumstances against which human foresight and prudence could not guard.<sup>50</sup> The burden of proof that a non-obvious risk of an employment was in a given case assumed by the servant rests on the carrier.<sup>51</sup>

In an action against a railroad for death of a passenger killed through the destruction of a train alleged to have been negligently run through a forest fire, plaintiff had the burden of proving that the carrier's engineer was negligent in attempting to proceed after discovering the fire.<sup>52</sup> In an action for injuries from a defect in a station platform received by a passenger in alighting, the burden is on the plaintiff to show that the injury is traceable to the accident.<sup>53</sup> A common carrier of passengers has the burden of removing the presumption of negligence which arises from the happening of an accident, causing injury to a passenger.<sup>54</sup> The burden

48. *Elwood v. Chicago City Ry. Co.*, 90 Ill. App. 397.

49. *Hollahan v. Metropolitan St. Ry. Co.*, 73 App. Div. (N. Y.) 164, 76 N. Y. Supp. 751.

50. *Bowen v. New York Cent. R. Co.*, 18 N. Y. 408.

51. *Dowd v. New York, etc., R. Co.*, 170 N. Y. 459.

52. *Konieszny v. Detroit & M. Ry.*

*Co.*, 17 Detroit Leg. N. 1002, 123 N. W. 1096.

53. *McClanahan v. St. Louis & S. F. R. Co.*, 147 Mo. App. 386, 126 S. W. 535.

54. *Lake Erie & W. R. Co. v. Cotton*, 45 Ind. App. 580, 91 N. E. 253; *Wilson v. Chicago City Ry. Co.*, 144 Ill. App. 604.

is upon a passenger who seeks to recover from a carrier damages for personal injuries sustained while upon his journey to prove negligence of facts from which a presumption of negligence arises.<sup>55</sup> In a street car passenger's action for injuries claimed to have been caused by the company's negligence, the burden is upon plaintiff to show by a preponderance of the evidence that the company's negligence caused the accident; negligence not being presumed from the fact that the passenger was injured.<sup>56</sup> In an action for the death of a passenger, it is necessary, not only to show that the accident occurred, but to show that the injury occurred through the fault of the defendant, and it is insufficient to show that defendant might have been guilty of negligence, especially where the evidence suggests with equal force that the injury might have resulted without its fault.<sup>57</sup> In an action against a railroad for injuries to a passenger by a wreck, a defense that the wreck was caused by malicious persons, who tampered with the track, casts

55. *Barlick v. Baltimore & O. R. Co.*, 41 Pa. Super. Ct. 87; *Norfolk & W. Ry. Co. v. Rhodes*, 109 Va. 176, 63 S. E. 445.

The act of a passenger in tossing through the open window of a car an empty bottle, the accidental breaking of such bottle against a car upon another track, and the return of a fragment of glass through another open window, injuring another passenger, is in no way connected with the appliances or machinery used in the operation of the road, or the acts of the employes in the conduct of the train, or with the construction of the road, and therefore there is no presumption of negligence on the part of the railroad company, and the burden is upon the injured passenger to prove by affirmative evidence that the defendant company or its employes had been

guilty of negligence which was responsible for the injury. *Barlick v. Baltimore & O. R. Co.*, *supra*.

56. *Butler v. Wilmington City Ry. Co.*, (Del. Super.), 78 Atl. 871; *Eaton v. Wilmington City Ry. Co.*, 1 Boyce (24 Del.), 435, 75 Atl. 369.

While negligence is not presumed from the mere fact of injury to a passenger in jumping to avoid an apparent collision, if the accident was of such character that it could not ordinarily happen if the company used reasonable care, the happening of the accident is some evidence of negligence, in absence of explanation, subject to rebuttal by negating the negligence alleged. *Id.*

See also, *Reiss v. Wilmington City Ry. Co.* (Del. Super.), 67 Atl. 153.

57. *Brown v. Union Pac. R. Co.*, 81 Kan. 701, 106 Pac. 1001.



upon the defendant the burden of proving, not only that the track was so tampered with, but that due care had been used in inspecting the track so as to discover the defects.<sup>58</sup> In a suit by a passenger against a carrier for personal injuries, proof of the accident shows negligence *prima facie*, and requires the carrier to disprove negligence, and show that the accident was inevitable, or resulted from a cause against which human care and foresight could not provide.<sup>59</sup> In an action against a carrier for injuries to a passenger, the burden of proof in the first instance rests on the plaintiff; but, under certain circumstances, it may shift to the defendant to rebut a presumption of negligence arising from such circumstances.<sup>60</sup> In an action against a railway company for the death of a circus employe while riding on his employer's train, the burden was on plaintiff to show all the essential elements of actionable negligence.<sup>61</sup> In an action by a passenger against a carrier for injuries, where it appears that the injury was not caused by any defect in the machinery or appliances used by the company, or any defect in the construction of the road, and was not caused by any act of the employes of the carrier, no presumption of the carrier's negligence arises, and the burden of proving negligence is on plaintiff.<sup>62</sup> The burden of proof to establish the specific negligence charged in the declaration is upon the passenger, and likewise is the burden upon the passenger to show *prima facie* the exercise of ordinary care for his own safety.<sup>63</sup> A passenger suing for injuries, who sets forth in the petition specific acts of negligence, assumes the burden of proving a reasonable inference of negligent opera-

58. Norton v. Galveston, etc., Ry. Co. (Tex. Civ. App.), 108 S. W. 1044.

59. Roanoke Ry., etc., Co. v. Sterrett, 111 Va. 293, 68 S. E. 998; Birmingham Ry., etc., Co. v. McCurdy, 172 Ala. 488, 55 So. 616; Walker v. Beaumont Land & Water Co., 15 Cal. App. 726, 115 Pac. 766.

60. Irvine v. Delaware, etc., R. Co., 184 Fed. 664, 106 C. C. A. 600.

61. Kelly v. Grand Trunk Western Ry. Co., 46 Ind. App. 697, 93 N. E. 616.

62. Le Deau v. Northern Pac. Ry. Co., 19 Idaho, 711, 116 Pac. 502, 34 L. R. A. (N. S.) 725.

63. Randall v. Sterling, etc., Ry. Co., 158 Ill. App. 56.

tion proximately causing the injuries, and he may not rely on the doctrine *res ipsa loquitur*.<sup>64</sup> The burden is upon the carrier to prove that an accident in which a passenger is shown to have been injured was unavoidable.<sup>65</sup> Where a *prima facie* case is made out to recover damages to a passenger through derailment of a train, the railroad company must show that the accident could not have been avoided by the exercise of the utmost human prudence.<sup>66</sup> Where a passenger is injured by anything done or left undone by a carrier or its employes in connection with appliances of transportation, or conduct of business, the burden of proof is upon the carrier to show absence of negligence.<sup>67</sup> One suing a street railroad for injuries sustained while alighting from a car, caused by the sudden starting of the car, has the burden of establishing by a fair preponderance of the evidence the negligence charged.<sup>68</sup>

The rule that a carrier is bound to exercise the utmost human skill makes it incumbent on it to explain the cause of an accident to relieve it from the presumption of negligence, and this applies to defective machinery and appliances, as in such respects the passenger must rely upon the carrier.<sup>69</sup> In an action for negligently killing a passenger in a collision, the burden was on the defendant to show that it discharged its duty to him.<sup>70</sup> In an action for injuries to a trespasser on a railroad train, the burden was on him to show, not only that he was in a perilous situation, but that such situation was discovered by defendant's employes, and that they

64. *Allison v. St. Louis & H. Ry. Co.*, 157 Mo. App. 370, 137 S. W. 896; *Gardner v. Metropolitan St. Ry. Co.*, 223 Mo. 389, 122 S. W. 1068; *Sterrett v. Metropolitan St. Ry. Co.*, 225 Mo. 99, 123 S. W. 877; *Orcutt v. Century Bldg. Co.*, 201 Mo. 424, 99 S. W. 1062.

65. *Kirkpatrick v. Metropolitan St. Ry. Co.*, 161 Mo. App. 515, 143 S. W. 865.

66. *St. Louis & S. F. R. Co. v. Posten*, 31 Okl. 821, 124 Pac. 2.

67. *Burns v. Pennsylvania R. Co.*, 233 Pa. 304, 82 Atl. 246.

68. *Foden v. Brooklyn Heights R. Co.*, 121 N. Y. Supp. 420, 136 App. Div. 765.

69. *Burke v. State*, 119 N. Y. Supp. 1089, 64 Misc. Rep. 558 (Ct. Cl.).

70. *Curtis v. Southern Ry. Co.*, 151 N. C. 523, 66 S. E. 599.

failed, after that, to exercise ordinary care to avoid injuring him.<sup>71</sup> Parents suing for the negligent death of a son while a passenger must, to recover, establish *prima facie* that the carrier was negligent, and that the negligence caused the death.<sup>72</sup> In an action for the death of a passenger the carrier is not called upon to offer evidence until facts showing a *prima facie* liability on its part have been proven.<sup>73</sup> Where the plaintiff in an action on the case for personal injuries was a passenger, the burden of proof is upon the defendant to show that the accident happened without its fault.<sup>74</sup> In an action against a carrier for injuries to a passenger, the burden of proof of negligence is on the plaintiff, and cannot be shifted to the defendant without showing that the injury in question was caused by some person or thing connected with the carrier's railroad or business of transportation.<sup>75</sup> In an action by a passenger against a street railway to recover for personal injuries caused by the alleged negligent starting of a car while plaintiff was in the act of alighting, the defense being a general or specific denial, the burden of proof never shifts, but remains with the plaintiff to prove that the injury was received substantially as alleged.<sup>76</sup>

Where injury to a passenger is within the rule *res ipsa loquitur*, the burden is on the carrier to exonerate itself from liability by showing that the accident was inevitable, or could not have been avoided by the exercise of the utmost care and foresight reasonably consistent with the prosecution of its business.<sup>77</sup> In a street car

71. *Arkansas & L. Ry. Co. v. Sain*, 90 Ark. 278, 119 S. W. 659, 22 L. R. A. (N. S.) 910.

72. *Hart v. St. Louis & S. F. R. Co.*, 80 Kan. 699, 102 Pac. 1101.

73. *Paris & G. N. Ry. Co. v. Robinson* (Tex. Civ. App.), 114 S. W. 658.

74. *Wabash R. Co. v. Jellison*, 124 Ill. App. 652.

75. *Pennsylvania R. Co. v. Mc-*

*Caffrey*, 149 Fed. 404, 79 C. C. A. 224.

76. *Lincoln Traction Co. v. Brookover* (Neb.), 100 N. W. 168, judg. revd. on rehearing, 111 N. W. 357.

77. *Western Ry. of Alabama v. McGraw* (Ala.), 62 So. 772.

A passenger cannot recover against a carrier for negligent damage, unless he offers some evidence of the negligence alleged. *Louisville & N. R. Co. v. Cornelius* (Ala. App.), 60 So. 740.

passenger's action for injuries, the burden was on plaintiff to prove that his injuries was the result of defendant's failure to observe such precautions as the exigencies of the case required.<sup>78</sup> In an action for injury to a passenger, the plaintiff must prove by competent evidence that the negligence of defendant was the proximate cause of the injury.<sup>79</sup> In an action by a passenger for damages for the failure of a carrier's servants to protect her from an illegal search, the passenger has the burden of proving knowledge on the part of the servants that the search which was by an officer was illegal.<sup>80</sup> The burden was on a passenger injured from being thrown from the platform of a train to show that his presence there was due to the overcrowded condition of the train.<sup>81</sup> The burden is on plaintiff, in a passenger's action for injuries, to prove the carrier's negligence;<sup>82</sup> but an injury to a passenger caused by apparatus furnished by or under the control of the company, raises a presumption of negligence.<sup>83</sup> In an action for injuries to a street railway passenger while alighting from a car at a usual stopping place, which was in an unsafe condition, no presumption of negligence of defendant arises from the mere happening of the accident; but the burden is on plaintiff to prove negligence.<sup>84</sup> Where it is shown that an injury was caused by the operation of a railroad train, the burden is upon the company to show that it exercised all ordinary care to avoid injury.<sup>85</sup>

78. *Previsich v. Butte Electric Ry. Co.* (Mont.), 131 Pac. 25.

79. *Painter v. Chicago, B. & Q. R. Co.*, 93 Neb. 419, 140 N. W. 787.

80. *Nashville, etc., Ry. v. Crosby* (Ala.), 62 So. 889.

81. *Alabama G. S. R. Co. v. Gilbert* (Ala. App.), 60 So. 542.

82. *Vischer v. Northwestern Elev. R. Co.*, 256 Ill. 572, 100 N. E. 270., affg. judg. 171 Ill. App. 544.

83. *Wayne v. St. Louis & N. E. Ry. Co.*, 165 Ill. App. 353; *Burgoyne v.*

*Chicago City Ry. Co.*, 167 Ill. App. 59.

84. *Rist v. Philadelphia R. T. Co.*, 236 Pa. 218, 84 Atl. 687. See also, *Williams v. Pittsburg Rys. Co.*, 50 Pa. Super. Ct. 473, 479.

85. *Atlantic Coast Line R. Co. v. Pipkin*, 64 Fla. 24, 59 So. 564. See, generally, as to Burden of Proof and Burden of Evidence, the very late work Chamberlayne's "Modern Law of Evidence," Vol. 2, Chaps. 11 and 12.

## § 20. The burden of proof as to contributory negligence.

The courts of the several States hold conflicting views upon the question as to whether the burden of proving contributory negligence, or its absence, is upon the plaintiff or the defendant. In a number of the States it is held that, inasmuch as the plaintiff cannot recover unless the injured party was in the exercise of ordinary care at the time of the injury, he must prove affirmatively that the injury occurred without negligence on his part,<sup>86</sup> and in some of these States, it is held that he must both allege and prove his freedom from contributory negligence.<sup>87</sup> In New York the rule is that, in all actions to recover damages resulting from the negligence of the carrier, the burden of proof is on the plaintiff to show affirmatively by a preponderance of evidence the absence of negligence on the part of the injured person contributing proximately to the injury, as well as the existence of negligence on the part of the defendant.<sup>88</sup> For instance, it is held that in an action

86. *Archer v. New York, etc., R. Co.*, 106 N. Y. 589; *Warner v. New York Cent., R. Co.*, 44 N. Y. 465; *Kuhnen v. Union R. Co.*, 10 App. Div. (N. Y.) 195, 41 N. Y. Sup. 774; *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9; *Young v. Citizens' St. R. Co.*, 148 Ind. 54, 44 N. E. 927, 47 N. E. 142; *Park v. O'Brien*, 23 Conn. 339; *Sirk v. Marion St. R. Co.*, 39 N. E. (Ind.) 421; *Bonce v. Dubuque St. Ry. Co.*, 53 Iowa, 278, 36 Am. Rep. 221; *Taylor v. Carew Mfg. Co.*, 143 Mass. 470; *Mynning v. Detroit, etc., R. Co.*, 67 Mich. 677; *City of Vicksburg v. Hennessey*, 54 Miss. 391; *Owens v. Richmond, etc., R. Co.*, 88 N. C. 502; *Cox v. South Shore & B. St. Ry. Co. (Mass.)*, 65 N. E. 823.

87. *Cincinnati, etc., R. Co. v. Butler*, 103 Ind. 31, 23 Am. & Eng. R. Cas. 262; *Louisville, etc., R. Co. v. Orr*, 84 Ind. 50; *Hinckley v. Cape*

*Cod, etc., R. Co.*, 120 Mass. 257; *Galena, etc., R. Co. v. Fay*, 16 Ill. 553, 63 Am. Dec. 323; *Greenleaf v. Illinois, etc., R. Co.*, 29 Iowa, 14, 4 Am. Rep. 181; *Slossen v. Burlington, etc., R. Co.*, 55 Iowa, 294, 7 Am. & Eng. R. Cas. 509; *Kennard v. Burton*, 25 Me. 39; *Moore v. Shreveport*, 3 La. Ann. 645.

88. *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Winterfield v. Second Ave. R. Co.*, 20 N. Y. Supp. 801, 49 N. Y. St. R. 435; *Leavitt's Code of Neg.* p. 254. But see *Keegan v. Western R. Co.*, 8 N. Y. 115. It is not enough to prove facts from which either the conclusion of negligence or the absence of negligence may with equal fairness be drawn, but the burden is upon the plaintiff to satisfy the jury that there was no contributory negligence on the part of the injured person. *Hart v. Hudson*

for negligence causing death, the burden is on the plaintiff to show, either by direct evidence or the drift of surrounding circumstances, that the deceased was without fault in approaching defendant's track, though there were no eye witnesses, and the precise cause and manner of the accident are unknown.<sup>89</sup> In Georgia it is held that, if it is shown that an employe for whose death an action is brought has disobeyed the orders of his superior, the burden is upon the plaintiff to show that such disobedience did not contribute in any degree to the injury.<sup>90</sup> In Maine, in an action for an injury caused by collision at a railroad crossing, between the train and plaintiff driving in a carriage, plaintiff must show affirmatively the company's negligence and his own want of contributory negligence.<sup>91</sup> The Indiana courts maintain the necessity of both an averment and proof of the injured person's freedom from negligence.<sup>92</sup> But, in those States where the burden of proof is upon the plaintiff to show that the injured person was free from fault, the law does not always require proof of due care and diligence on the part of the plaintiff. Under certain circumstances it may be assumed that he observed ordinary care for his safety.<sup>93</sup> The absence of any fault on the part of the person injured may be inferred from the circumstances of the case, and the ordinary habits, conduct and motives of men.<sup>94</sup> It is proper to consider the natural instinct of self preservation and the known disposition of men to save themselves from harm, which raises a presumption of want of contributory negligence.<sup>95</sup> But, a bare presumption is

Riv. R. Co., 84 N. Y. 56. The rule is the same in Illinois. *North Chicago St. Ry. Co. v. Louis*, 27 N. E. (Ill.) 451, revg. on other grounds, 35 Ill. 477.

89. *Tolmon v. Syracuse, etc., R. Co.*, 98 N. Y. 198, 50 Am. Rep. 649.

90. *Prather v. Richmond & D. R. Co.*, 80 Ga. 427, 9 S. E. 530.

91. *Lesan v. Maine Cent. R. Co.*, 77 Me. 85.

92. *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287.

93. *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425.

94. *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Texas & New Orleans Ry. Co. v. Crowder*, 63 Tex. 502.

95. *Denver Tramway Co. v. Reid*, 4 Am. Electl. Cas. 332, 4 Col. App. 53, 35 Pac. 269.

default.<sup>96</sup> In some cases it has been held that there is a presumption that he was not using ordinary care.<sup>97</sup> It has been held by the United States Supreme Court, however, that, irrespective of statute law on the subject, the burden of proof as to plaintiff's freedom from contributory negligence does not rest upon the plaintiff; that plaintiff may establish the negligence of the defendant, his injury in consequence thereof, and his case is made out; if there are circumstances which convict him of concurrent negligence, the defendant must prove them and thus defeat the action.<sup>98</sup> The question of contributory negligence is thus made a defense in the Federal courts, the burden of supporting which is upon the defendant.<sup>99</sup> This rule that the burden of proof of contributory negligence is upon the defendant is not varied by the fact that the plaintiff alleges that he was in the exercise of due care, or by any other state of the pleadings.<sup>1</sup> The rule that there is presumption of

96. *Squire v. Central Park, etc., R. Co.*, 36 N. Y. Supp. 459; *Button v. Hudson River R. Co.*, 18 N. Y. 248.

The presumption that men will naturally avoid rather than court or defy danger is not sufficient to overcome the necessity for some proof of the absence of contributory negligence by one killed by a train at a street crossing. *Pittsburg, etc., R. Co. v. Bennett* (Ind. App.), 35 N. E. 1033. Though it is unnecessary, in an action for a death caused by negligence, to produce direct evidence of a lack of contributory negligence on the part of the deceased, it is necessary to show facts and circumstances from which it may be reasonably inferred that he was exercising proper care. *Lorickio v. Brooklyn H. R. Co.*, 44 App. Div. (N. Y.) 628, 60 N. Y. Supp. 247.

97. *Indiana, etc., R. Co. v. Green*, 106 Ind. 279, 25 Am. & Eng. R. Cas. 322, 55 Am. Rep. 736; *State v. Maine, etc., R. Co.*, 76 Me. 357, 19 Am. & Eng. R. Cas. 312, 49 Am. Rep. 622.

98. *Washington, etc., R. Co. v. Gladmon*, 82 U. S. (15 Wall.) 401, 21 L. Ed. 114; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 298, 23 L. Ed. 900; *Hough v. Railway Co.*, 100 U. S. 226, 25 L. Ed. 618; *Coasting Co. v. Tolson*, 139 U. S. 557, 35 L. Ed. 274, 11 Sup. Ct. Rep. 655.

99. *Chesapeake & O. R. Co. v. Steele*, 84 Fed. 93, 54 U. S. App. 550, 29 C. C. A. 81.

1. *Fitchburg R. Co. v. Nichols*, 50 U. S. App. 297, 85 Fed. 945, 29 C. C. A. 500; *Denver & R. G. R. Co. v.*

ordinary care in favor of plaintiff and defendant both, or no presumption of negligence as against either party, except such as arises from the facts proved, and that it devolves upon the plaintiff to prove a want of ordinary care, or negligence, on the part of the defendant, and on the defendant to prove a want of ordinary care, or negligence, on the part of the plaintiff, contributing to his injury, is held by the courts in a majority of the States and by most text writers.<sup>2</sup> If the plaintiff's case has shown that under the

Ryan, 28 Pac. (Colo.) 79. Nor is plaintiff's burden of showing that he was not guilty of contributory negligence, in those jurisdictions where he is required to make such proof, shifted by the fact that defendant unnecessarily pleaded plaintiff's contributory negligence. Hawes v. Burlington, etc., Ry. Co., 64 Iowa, 315.

2. Mobile, etc., R. Co. v. Jay, 65 Ala. 113; Hobson v. New Mexico & A. R. Co., 11 Pac. (Ari.) 545, holding that when the evidence for plaintiff does not show want of care, the onus is on defendant to prove his want of care; Thompson v. Duncan, 76 Ala. 334; Missouri Pac. Ry. Co. v. McCally, 41 Kan. 639, 21 Pac. 574; Fulks v. St. Louis, etc., Ry. Co., 19 S. W. (Mo.) 818; Crumpley v. Hannibal, etc., R. Co., 19 S. W. (Mo.) 820; Anderson v. Chicago, etc., R. Co., 52 N. W. (Neb.) 840; San Antonio, etc., Ry. Co. v. Bennett, 76 Tex. 151; Spurrier v. Front St. Cable Ry. Co., 29 Pac. (Wash.) 346; Waterman v. Chicago, etc., R. Co., 52 N. W. (Wis.) 247; Western Union Tel. Co. v. Eyser, 2 Colo. 154; Texas, etc., R. Co. v. Orr, 46 Ark. 194; Sanders v. Reister, 1 Dak. 172, 46 N. W. 685; Hopkins v. Utah N. Ry. Co., 2 Idaho, 280, 13 Pac. 345; Kansas City, etc.,

R. Co. v. Phillibert, 25 Kan. 586; Paducah, etc., R. Co. v. Hoebl, 12 Bush (Ky.), 47; Freck v. Philadelphia, etc., R. Co., 39 Md. 576; Davis v. Kansas City Ry. Co., 46 Mo. App. 189; Higby v. Gilmore, 3 Mont. 97; Lincoln v. Walker, 18 Neb. 247, 20 N. W. 114; Cox v. Norfolk, etc., R. Co., 123 N. C. 613, 31 S. E. 851; Gram v. Northern, etc., R. Co., 1 N. Dak. 260, 45 N. W. 974; Cassidy v. Angel, 12 R. I. 449, 34 Am. Rep. 691; Smith v. Chicago, etc., Ry. Co., 4 S. Dak. 80, 55 N. W. 720; Reddon v. Union Pac. Ry. Co., 5 Utah, 355, 15 Pac. 265; Baltimore, etc., R. Co. v. Whittington, 30 Gratt. (Va.) 809; Norfolk, etc., R. Co. v. Burge, 84 Va. 70, 4 S. E. 25; Northern, etc., R. Co. v. O'Brien, 1 Wash. 607, 21 Pac. 35; Sheff v. Huntington, 16 W. Va. 317; Hulehan v. Green Bay, etc., R. Co., 68 Wis. 527, 32 N. W. 532; McDougal v. Central R. Co., 63 Cal. 431; Kentucky Cent. R. Co. v. Thomas, 79 Ky. 150; Hocum v. Weitherick, 22 Minn. 152; Smith v. Eastern R. Co., 35 N. H. 356; New Jersey Express Co. v. Nichols, 33 N. J. L. 434; Baltimore, etc., R. Co. v. Whitacre, 35 Ohio St. 627; Grant v. Baker, 12 Or. 329; Bradwell v. Pittsburgh, etc., Ry. Co., 139 Pa. St. 404;



circumstances the defendant owed him a duty and that that duty has not been performed, and that the injury has resulted therefrom, the obligation is then upon the defendant to prove plaintiff's contributory negligence as a defence to the action.<sup>3</sup> In other words, when the plaintiff has shown the negligence of the defendant as a proximate cause sufficient to account for the injury, upon evidence which clearly make a *prima facie* case, without showing fault on his part or anything raising a presumption thereof, it devolves upon defendant to show plaintiff's contributory negligence affirmatively in order to prevent a recovery.<sup>4</sup> But if plaintiff's testimony raises a presumption of contributory negligence on his part, the burden rests upon him to remove that presump-

Carter v. Columbia, etc., R. Co., 19 S. C. 20, 45 Am. Rep. 754; Hill v. New Haven, 37 Vt. 501; Indianapolis St. Ry. Co. v. Robinson, 61 N. E. (Ind.) 936. As to the proof required of plaintiff when the burden is on the defendant, it was said in Lincoln v. Walker, *supra*, "In view of the conflict in the authorities, we are compelled to adopt such rule as may seem most consonant with justice. This being so, there certainly is no presumption that the plaintiff was negligent. We therefore hold the rule to be, that, if the plaintiff can prove his case without showing contributory negligence, it is a matter of defence to be proved by the defendant." Stevens v. Missouri Pac. R. Co., 67 Mo. App. 356; Omaha St. R. Co. v. Martin, 48 Neb. 65, 4 Am. & Eng. R. Cas. N. S. 1, 66 N. W. 1007; McDonald v. Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

3. Oldfield v. New York, etc., R. Co., 14 N. Y. 310; Johnson v. Hudson River R. Co., 20 N. Y. 65; Button v. Hudson River R. Co., 18 N. Y.

248; Wilds v. Hudson R. Co., 24 N. Y. 230; Washington, etc., R. Co. v. Gladmon, 15 Wall. 401; Buesching v. Gaslight Co., 73 Mo. 229; Pennsylvania R. v. Weber, 76 Pa. St. 157; Kansas City, etc., R. Co. v. Flynn, 78 Mo. 195; Abbett v. Chicago, etc., R. Co., 30 Minn. 482; McDougal v. Central R. Co., 63 Cal. 431; Dallas, etc., R. Co. v. Spieker, 61 Tex. 427; Pittsburgh, etc., R. Co. v. Wright, 80 Ind. 182, 5 Am. & Eng. R. R. Cas. 628.

4. Milwaukee, etc., R. Co. v. Hunter, 11 Wis. 160, 78 Am. Dec. 699; Johnson v. Hudson River R. Co., *supra*; Hoyt v. Hudson, 41 Wis. 105, 22 Am. Rep. 714; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Dallas, etc., R. Co. v. Spieker, 61 Tex. 427, where the court said: "It would seem that a plaintiff would be entitled in every case of this character to recover upon evidence which clearly makes a *prima facie* case, unless such case be rebutted by testimony offered by himself or by defendant."

tion.<sup>5</sup> It is a rule of universal application that if plaintiff's declarations or evidence establishes his own contributory negligence, it bars his recovery, no matter where the burden of proof rests.<sup>6</sup>

Where a passenger, on being ordered to leave the car, uses violence beyond what is necessary to prevent blows or protect himself from excessive force, the burden is on him, in an action against the carrier, to prove that his illegal acts did not contribute to the injury.<sup>7</sup> In an action by a passenger who was ejected from a railroad train, though he had a ticket, where the company defended on the ground that he failed to produce his ticket, the burden of proving that he intended to produce his ticket and that he so notified the conductor is on the plaintiff.<sup>8</sup> Where a passenger, suing for wrongful ejection from the train on the refusal of the conductor to honor his ticket, which had expired, relied on a special contract with the agent selling the ticket that he should have the right to the trip until a designated date, an answer alleging that the contract was evidenced by the ticket alone denied the special contract, and the burden of proof was on the passenger.<sup>9</sup> In an action against a street railway company for ejecting a passenger who presented an improperly punched transfer, the burden was on him to show that the conductor on the first car was bound to issue a transfer to him to the car from which he was ejected.<sup>10</sup>

In an action for injuries to a passenger, where the answer is a general denial only, contributory negligence not being pleaded,

5. *Baltimore, etc., R. Co. v. Whitacre*, 35 Ohio St. 627; *Hobson v. New Mexico, etc., R. Co.*, *supra*; *Cassidy v. Angell*, *supra*; *San Antonio, etc., R. Co. v. Bennett*, *supra*.  
6. *Washington, etc., R. Co. v. Gladmon*, *supra*; *Freek v. Phila*, *supra*; *McQuillen v. Central Pac. R. Co.*, 50 Cal. 7; *Lincoln v. Walker*, *supra*; *Boss v. Providence, etc., R. Co.*, 21 Am. & Eng. R. Cas. (R. I.) 364; *New Jersey Exp. Co. v. Nichols*,

23 N. J. L. 434; *Winship v. Enfield*, 42 N. H. 197; *Baltimore, etc., R. Co. v. Whitacre*, 35 Ohio St. 627.

7. *Jackson v. Old Colony St. Ry. Co.*, 206 Mass. 477, 92 N. E. 725.

8. *Louisville & N. R. Co. v. Mason*, 4 Ala. App. 353, 58 So. 963.

9. *Cincinnati, etc., R. Co. v. Carson*, 145 Ky. 81, 140 S. W. 71.

10. *Birmingham Ry., etc., Co. v. Turner*, 154 Ala. 542, 45 So. 671.

plaintiff, to sustain the action, is not bound to prove that she did no act, or that she did not omit to do anything, which contributed to her injury; but if her evidence shows that she negligently did something or failed to exercise reasonable care for her own safety, which act or omission was the proximate cause of her injury, she cannot recover.<sup>11</sup> The burden of proving that a passenger, injured by jumping from a street car to avoid a threatened danger by the explosion of the controllers, was negligent, is on the carrier.<sup>12</sup> In an action against a railroad for injuries to a passenger in an alleged dangerous baggage room, the burden of proving that plaintiff must have seen and ought to have avoided the danger was on defendant.<sup>13</sup> In an action against a street railway company for personal injuries, the burden of proof of negligence on the part of the defendant as to the cause of the injury is upon the plaintiff; but this burden is changed, in case of a passenger, when it has been shown that the accident which caused the injury occurred while the latter was a passenger, and the burden of proof is then cast upon the defendant to explain the cause of the accident, and to show that the plaintiff was negligent, and that his negligence caused, or contributed to the happening of, the injury.<sup>14</sup>

## § 21. Presumptions and burden of proof as to contributory negligence.

The burden of proving contributory negligence of a passenger is on the carrier.<sup>15</sup> The burden of proving that contributory negligence of a daughter was the sole cause of an injury to her mother is on the railroad company, sued for injuries.<sup>16</sup> In an action

11. *Altwein v. Metropolitan St. Ry. Co.*, 86 Kan. 220, 120 Pac. 550.

12. *Louisville & S. I. Traction Co. v. Worrell*, 44 Ind. App. 480, 86 N. E. 78.

13. *Bates v. Chicago, etc., Ry. Co.*, 140 Wis. 235, 122 N. W. 745.

14. *Kehan v. Washington Ry., etc., Co.*, 28 App. D. C. 108.

15. *Harmon v. United Rys. Co. of St. Louis*, 163 Mo. App. 442, 143 S. W. 1114.

16. *Lang v. Interborough Rap. T. Co.*, 134 N. Y. Supp. 627, 76 Misc. Rep. 195.

against a street railway company for death caused by collision of a street car with plaintiff's intestate while awaiting the car to take passage thereon, the plaintiff assumes the burden of showing by a preponderance of the evidence that her intestate was not guilty of contributory negligence.<sup>17</sup> In an action for injuries to a street car passenger by an alleged premature start, contributory negligence, precluding a recovery, is not presumed, but must be proved by the defendant, unless it otherwise appears from the evidence in the case.<sup>18</sup> No presumption of negligence arises from the use by a passenger of the platform of a street railway car, even though there are seats to be had inside, so long as such use is not forbidden by a rule kept in active operation.<sup>19</sup> In an action for death of a person at a station while he was crossing the track in front of the approaching train to get to a place where he could board the train, caused by his being struck by the engine, deceased being negligent, the burden of proof was on the plaintiff to show that the employes of the train discovered his perilous position in time to have avoided injury, and negligently failed to use proper means to avoid injuring him after discovering his peril.<sup>20</sup> The relation of carrier and

17. *Kruck v. Connecticut Co.*, 84 Conn. 401, 80 Atl. 162.

18. *File v. Wilmington City Ry. Co.* (Del. Super.), 80 Atl. 523; *Coyle v. People's Ry. Co.* (Del. Super.), 80 Atl. 638; *Freeman v. Wilmington & P. T. Co.* (Del. Super.), 80 Atl. 1001; *Elliott v. Wilmington City Ry. Co.*, 6 Pen. (Del.) 570, 73 Atl. 1040; *Eaton v. Wilmington City Ry. Co.*, 1 Boyce (24 Del.), 435, 75 Atl. 369.

19. *Hart v. Capital Traction Co.*, 35 App. D. C. 502.

That a street car passenger was riding on the platform when injured in a collision raises a presumption of contributory negligence, so as to require him to show in an action for resulting injuries that his position

there did not contribute to his injury. *Alabama City, G. & A. Ry. Co. v. Ventress* (Ala.), 54 So. 652.

20. *St. Louis, etc., Ry. Co. v. Watson*, 97 Ark. 560, 134 S. W. 949.

Instructions that a preponderance of the evidence showing that the passenger was killed by defendant's train would make a *prima facie* case of negligence, and to escape liability the burden was on defendant to show by a preponderance of the evidence that it was not negligent or that decedent was guilty of contributory negligence; that the burden was on defendant to show by preponderance of all the evidence that decedent was guilty of contributory negligence; and that defendant was not bound to prove contrib-

passenger is created only by contract, express or implied, and the presumption is that one riding out of the place provided by a railroad company for passengers is not a passenger, or, if such, that he has assumed the increased risk from riding there.<sup>21</sup> A passenger injured by derailment of the train, in order to recover, must show not only that he was a passenger, but that at the time of the accident he was also in a place where he had a right to be, or, at least, that the place where he was, if he was not in the right place, did not affect the result.<sup>22</sup> The burden of proving contributory negligence of a passenger suing for a personal injury received while attempting to alight from a car rests, upon the Indiana statute, on the carrier.<sup>23</sup>

A street car passenger, suing for injuries by being thrown from the running board of a car as it struck a curve in the track, must establish by a fair preponderance of the evidence his freedom from contributory negligence.<sup>24</sup> Getting on or off a moving train is evidence of contributory negligence and imposes on one injured in so doing the burden of proving that he was justified by the cir-

umstances. Contributory negligence if it appeared from plaintiff's evidence taken together, correctly stated the rule as to burden of proof as to contributory negligence. *St. Louis, etc., Ry. Co. v. Hutchinson*, 101 Ark. 424, 142 S. W. 527.

Even if the mother's contributory negligence was a defense to an action for a child's death while a passenger by its administrator, the burden of proving contributory negligence was on the railroad company. *Miles v. St. Louis, etc., R. Co.*, 90 Ark. 485, 119 S. W. 837.

A bare admission of a passenger on a freight train that he was standing up in the caboose when injured does not create a *prima facie* case of contributory negligence, so as to cast on him the burden of proving his freedom therefrom. *St. Louis, I. M. & S.*

*Ry. Co. v. Gilbreath*, 87 Ark. 572, 113 S. W. 200.

21. *Chicago, etc., Ry. Co. v. Thurlow* (U. S. C. C. A., Kan.), 178 Fed. 894, 102 C. C. A. 128.

22. *Winters v. Baltimore & O. R. Co.* (U. S. C. C., Ohio), 163 Fed. 106.

Where plaintiff shows that while a passenger he was injured, the burden shifts to the defendant to satisfy the jury by a preponderance of the evidence that it was not guilty of negligence that proximately contributed to the injury. *Cincinnati Traction Co. v. Leach* (U. S. C. C. A., Ohio), 169 Fed. 549, 95 C. C. A. 47.

23. *Indiana Union Traction Co. v. Keiter*, 175 Ind. 268, 92 N. E. 982.

24. *Maereker v. Brooklyn Heights R. Co.*, 122 N. Y. Supp. 87, 137 App. Div. 49.

cumstances of the case.<sup>25</sup> A carrier alleging that a passenger suing for personal injuries received while attempting to alight from a train at her station was guilty of contributory negligence has the burden of proving the defense.<sup>26</sup> A fifteen-year-old boy is presumed to be sufficiently intelligent to appreciate the danger of riding on the platform of a railway car; and the burden is upon him in an action for injuries sustained while so riding to show that he lacked such intelligence and discretion.<sup>27</sup> Where, in an action for injuries, it is shown that the accident which caused the injury occurred while the plaintiff was a passenger, the burden of proof is on the defendant to explain the cause of the accident, and to show, if that be the defense, that the plaintiff was negligent, and that his negligence caused or contributed to the injury.<sup>28</sup>

## § 22. Presumptions and burden of proof in actions for assault.

The burden is upon the plaintiff assaulted at a railway station to show that the railroad company had actual or constructive knowledge of his assailant's vicious habits and employed or harbored him at the station, and that such acts were the proximate cause of the injury.<sup>29</sup> In an action for injuries to a passenger who was assaulted by the company's conductor, where the petition alleged that the conductor made the assault while acting in the

25. *Holyman v. Kanawha & M. Ry. Co.*, 65 W. Va. 264, 64 S. E. 536.

26. *St. Louis S. W. Ry. Co. of Texas v. Adis* (Tex. Civ. App.), 142 S. W. 955; *Houston & T. C. R. Co. v. Harris* (Tex. Civ. App.), 120 S. W. 500.

A carrier in a suit for injuries to a passenger carried beyond her station has the burden of showing facts raising the issue of contributory negligence *Missouri, etc., Ry. Co. of Texas v. Morgan* (Tex. Civ. App.), 103 S. W. 724.

Where, in an action for injury to a passenger, contributory negligence is not involved in the facts alleged and

proved by plaintiff, the burden is on the carrier to show contributory negligence. *Herring v. Galveston, etc., Ry. Co.* (Tex. Civ. App.), 108 S. W. 977, writ of error dismissed, *Galveston, etc., Ry. Co. v. Herring* (Tex.), 113 S. W. 521; *Gulf, etc., Ry. Co. v. Booth* (Tex. Civ. App.), 97 S. W. 128.

27. *Walling v. Trinity & Brazos Valley Ry. Co.* (Tex. Civ. App.), 106 S. W. 417.

28. *Washington, etc., Ry. Co. v. Chapman*, 26 App. D. C. 472.

29. *Blaisdell v. Long Island R. Co.*, 136 N. Y. Supp. 768, 152 App. Div. 218, revg. order 131 N. Y. Supp. 14.

scope of his employment, the denial of that allegation places the burden of proof on the passenger.<sup>30</sup> One suing a street railway company for injuries received while a passenger, in consequence of being assaulted by the conductor, has the burden of showing, by the weight of the evidence, that the injury was caused by the wrongful act of the conductor, or the verdict must be for the company.<sup>31</sup> In an action by a passenger against a railway company for damages for an assault by defendant's conductor, provoked by plaintiff as the aggressor, the burden was on the defendant to show that such conductor used no more force than appeared to him, as a reasonable man, necessary to repel plaintiff's assault on him.<sup>32</sup> In an action by a passenger against a carrier for permitting other passengers to insult plaintiff with offensive language, plaintiff has the burden of showing as nearly as possible the language used; and that is not done by a mere statement that the passengers complained of cursed and used vulgar and obscene language and sang vulgar songs.<sup>33</sup>

30. *White v. South Covington & C. St. Ry. Co.*, 150 Ky. 631, 150 S. W. 837.

31. *Rosenkovitz v. United Rys., etc., Co. of Baltimore*, 108 Md. 306, 70 Atl. 108.

32. *St. Louis S. W. Ry. Co. v. Berger*, 64 Ark. 613, 44 S. W. 809, 39 L. R. A. 784.

33. *St. Louis S. W. Ry. Co. of Texas v. Wright*, 33 Tex. Civ. App. 80, 75 S. W. 565.

## CHAPTER XXVIII.

### EVIDENCE.

- SECTION** 1. Authority, competency, and negligence of servants.  
2. Condition of means of transportation.  
3. Evidence of other and similar accidents.  
4. Subsequent repairs and precautions.  
5. Custom or habit of carrier or passenger.  
6. Tickets as evidence of contract for transportation.  
7. Declarations and admissions of injured passengers.  
8. Declarations and admissions of employes.  
9. Declarations and conduct of other persons.

#### § 1. Authority, competency, and negligence of servants.

A person with a conductor's cap and badge, acting on a moving train as conductor, or one on the train in the dress of and acting as brakeman and addressed as such by other employes, or one apparently at work on a locomotive, with his coat off, will be presumed in the absence of other evidence, to be in the employ of the carrier.<sup>1</sup> Evidence of former specific acts of negligence is admissible to show the incompetency of a servant,<sup>2</sup> and also negligence on the carrier's part in employing and retaining him.<sup>3</sup> But a single exceptional act of negligence will not be sufficient to prove incompetency.<sup>4</sup> Evidence of particular instances of care are admissible to disprove evidence of carelessness shown by particular instances.<sup>5</sup>

1. *Hoffman v. New York Cent., etc., R. Co.*, 45 N. Y. Super. Ct. 1; *Hughes v. New York, etc., R. Co.*, 36 N. Y. Super. Ct. 222; *McCoun v. New York Cent., etc., R. Co.*, 66 Barb. (N. Y.) 338; *Baltimore, etc., R. Co. v. Kane*, 69 Md. 11, 9 Am. St. Rep. 387; *Lampkins v. Vicksburg, etc., R. Co.*, 42 L. Ann. 997. But see *Lindsay v. Central R., etc., Co.*, 46 Ga. 447; *Patterson v. Wabash, etc., R. Co.*, 54 Mich. 91.

2. *McKinney v. Neil*, 1 McLean

(U. S.), 540; *Peck v. Neil*, 3 McLean (U. S.), 22; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181; *Detroit, etc., R. Co. v. Van Steinburg*, 17 Mich. 99; *Nashville, etc., R. Co. v. Johnson*, 15 Lea (Tenn.), 677.

3. *Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552.

4. *Dallas City R. Co. v. Beeman*, 74 Tex. 291.

5. *Plummer v. Ossipee*, 59 N. H. 55.



**Evidence of carelessness and recklessness of the carrier's servant at other places on the trip on which plaintiff was injured is competent upon the main allegation of negligence.<sup>6</sup>** But proof of carelessness or unskillful management at other times or on other occasions is inadmissible to prove negligence at the time of the accident.<sup>7</sup> Evidence of the care taken in the selection of servants is not admissible on the question of their negligence.<sup>8</sup> A habit of intoxication on the part of an employe may be shown to prove negligence and it raises a presumption which stands until rebutted.<sup>9</sup> That the servant had a drink just before starting on the trip is admissible, as bearing on his condition at the time of the accident.<sup>10</sup> Evidence of the use of reckless language is competent for the purpose of showing rashness or unfitness.<sup>11</sup>

## § 2. Condition of means of transportation.

Evidence to show the defective condition of the track is limited

**6.** *Pyne v. Broadway, etc., R. Co.*, 19 N. Y. Supp. 217; *Reichman v. Second Ave. R. Co.*, 1 N. Y. Supp. 836. See *Nashville, etc., R. Co. v. Johnson*, 15 Lea (Tenn.), 677, evidence that a section boss permitted other portions of the road on his section to get out of repair admissible to show negligence in the repair of the road at the place of the accident.

**7.** *Cohn v. New York Cent., etc., R. Co.*, 6 App. Div. (N. Y.) 193. 39 N. Y. Supp. 986; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Peck v. Neil*, 3 McLean (U. S.), 22; *Hayes v. St. Louis R. Co.*, 15 Mo. App. 583; *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Mississippi Cent. R. Co. v. Miller*, 40 Miss. 45; *Gulf, etc., R. Co. v. Rowland*, 82 Tex. 166.

**8.** *Augusta, etc., R. Co. v. Randall*, 85 Ga. 297.

**9.** *Pennsylvania R. Co. v. Books*,

57 Pa. St. 339; *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475; *Hobson v. New Mexico, etc., R. Co.* (Ariz.), 11 Pac. 545; *Fitzpatrick v. Bloomington City R. Co.*, 73 Ill. App. 516, not admissible on the question of negligence, but it is competent to show his condition on the day of the injury.

**10.** *Pyne v. Broadway, etc., R. Co.*, 19 N. Y. Supp. 217. Where plaintiff gave evidence that on other days the driver started his car suddenly and used intoxicants while on duty, and the court, of its own motion, ordered this evidence stricken out, so far as defendant's objection applied, and it was not again referred to during the trial, any error in its reception was cured. *Ganiard v. Rochester, etc., R. Co.*, 2 N. Y. Supp. 470.

**11.** *Nashville, etc., R. Co. v. Meschino*, 1 Sneed. (Tenn.) 221.

to showing its condition, at the time of the accident, at the place of the accident or in the immediate vicinity, the latter being admissible to show by inference its condition at the place of the accident, or as corroborative evidence.<sup>12</sup> Evidence of the general condition of the roadbed and track, over which a train had to pass before reaching the place where a derailment occurred, is admissible for the purpose of showing negligence in operating the train, such as the too rapid running of the train over an imperfect track.<sup>13</sup> When the stability of a bridge as a whole is involved in the charge of negligence, it is competent to give evidence of the condition, at the time of the accident, of the portions of the bridge left standing, and not immediately involved in the wreck.<sup>14</sup> Evidence of the condition of the track some time after the accident is admissible,

12. *N. Y.*—*Reed v. New York Cent. R. Co.*, 45 *N. Y.* 574, evidence of the defective condition of the road at a point half a mile distant from the place of the accident inadmissible; *Murphy v. New York Cent. R. Co.*, 66 *Barb. (N. Y.)* 125.

*U. S.*—*Vicksburg, etc., R. Co. v. Putnam*, 118 *U. S.* 545, evidence of general condition of the track in the vicinity of the place of derailment admissible.

*Ala.*—*Richmond, etc., R. Co. v. Vance*, 93 *Ala.* 144; *Alabama G. S. R. Co. v. Hill*, 93 *Ala.* 514, general bad condition at or near the place and within 30 feet admissible.

*Dak.*—*Pattee v. Chicago, etc., R. Co.*, 5 *Dak.* 267.

*Iowa.*—*Fitch v. Mason City, etc., Tract. Co.*, 116 *Iowa*, 716, 89 *N. W.* 33; *Allison v. Chicago, etc., R. Co.*, 42 *Iowa*, 274, evidence as to defects within 16 rods admissible.

*Kan.*—*Union Pac. R. Co. v. Hand*, 7 *Kan.* 380.

*Ky.*—*Ohio Valley R. Co., v. Wat-*

*son*, 93 *Ky.* 654, 14 *Ky. Law Rep.* 611, 21 *S. W.* 244, 19 *L. R. A.* 310, 40 *Am. St. Rep.* 211.

*Mich.*—*Laughlin v. Grand Rapids St. R. Co.*, 62 *Mich.* 220; *Grand Rapids, etc., R. Co. v. Huntley*, 38 *Mich.* 539.

*Mo.*—*Stoher v. St. Louis, etc., R. Co.*, 91 *Mo.* 509; *Sidekum v. Wabash, etc., R. Co.*, 93 *Mo.* 400.

*N. C.*—*Hedges v. Wilmington, etc., R. Co.*, 73 *N. C.* 558.

*Minn.*—*Morse v. Minneapolis, etc., R. Co.*, 30 *Minn.* 465.

*Tenn.*—*Nashville, etc., R. Co. v. Johnson*, 15 *Lea (Tenn.)*, 677.

*Tex.*—*Taylor, etc., R. Co. v. Taylor*, 79 *Tex.* 104; *Missouri Pac. R. Co. v. Mitchell*, 75 *Tex.* 77, 12 *S. W.* 810.

*Wis.*—*Stewart v. Everts*, 76 *Wis.* 35.

13. *Southeastern R. Co. v. Southworth*, 135 *Ill.* 250; *Missouri Pac. R. Co. v. Collier*, 62 *Tex.* 318.

14. *Leonard v. Southern Pac. R. Co.*, 21 *Or.* 555.

where it is shown that the track was in the same condition then as at the time of the accident.<sup>15</sup> On an issue as to the negligent operation of an electric car at the time of an accident, testimony that another car, moving over the same part of the road, a month later, was negligently operated, was inadmissible, where it did not appear that such car was similar to the one on which the accident occurred, or that it was operated under like conditions.<sup>16</sup> Official reports of railroad officers and employes prior to the accident as to the condition of the track are admissible against the carrier to show the condition of the track at the time of the accident.<sup>17</sup> Evidence of general rumor among the employes of the carrier as to the condition of any of the means of transportation is hearsay and irrelevant to prove its bad condition; but it is admissible to show negligence in the use of such means by the carrier after it should have known of its unsafe condition.<sup>18</sup> Proof of a custom on the part of the carrier to keep its track in general good repair is not admissible to show the good condition of the track.<sup>19</sup>

### § 3. Evidence of other and similar accidents.

Evidence of other and similar accidents, if any have occurred by reason of the method of construction of or defects in any of the means of transportation, is admissible, to show the dangerous condition of such means of transportation,<sup>20</sup> and to show notice to and

15. *Byrne v. Brooklyn City, etc.*, R. Co., 6 Misc. Rep. (N. Y.) 260, 26 N. Y. Supp. 760, *affd.* 145 N. Y. 619; *Jacksonville, etc., R. Co. v. Southworth*, 135 Ill. 250; *Pennsylvania Co. v. Marion*, 104 Ind. 239. See also, *Chicago, etc., R. Co. v. Lewis*, 48 Ill. App. 274.

16. *Schmidt v. Coney Island, etc.*, R. Co., 49 N. Y. Supp. 777.

17. *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545; *Texas, etc., R. Co. v. Lester*, 75 Tex. 56.

18. *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472.

19. *Fort Worth, etc., R. Co. v. Thompson*, 2 Tex. Civ. App. 170.

20. *Gabriel v. Long Island R. Co.*, 54 App. Div. (N. Y.) 41, 66 N. Y. Supp. 301; *Hanrahan v. Manhattan R. Co.*, 53 Hun (N. Y.), 420, 6 N. Y. Supp. 395, *affd.* 130 N. Y. 658, 29 N. E. 2033; *Central, etc., Co. v. Smith*, 80 Ga. 526; *Bullard v. Boston, etc., R. Co.*, 64 N. H. 27; *Missouri Pac. R. Co. v. Neiswanger*, 41 Kan. 621;

knowledge by the carrier of such condition,<sup>21</sup> but it is not admissible to prove an independent act of negligence.<sup>22</sup> Evidence as to former experience of the carrier in operating its trains under similar conditions is inadmissible to disprove negligence,<sup>23</sup> unless the conditions and circumstances are shown to have continued the same up to the time of the accident.<sup>24</sup> Evidence as to the result of subsequent experiments made at the same place and under the same circumstances and conditions as those existing at the time of the accident is admissible.<sup>25</sup>

#### § 4. Subsequent repairs and precautions.

Evidence of repairs, or alterations, or precautions, made or taken by the carrier after an accident, is not admissible as proof of prior negligence.<sup>26</sup> The ground of this rule is that it would be unjust that the carrier could not, after an unexpected accident, and as a measure of extreme caution, adopt additional safeguards, without

Cleveland, etc., R. Co. v. Newell, 104 Ind. 264; Morse v. Minneapolis, etc., R. Co., 30 Minn. 465; Mobile, etc., R. Co. v. Ashcraft, 48 Ala. 15, 49 Ala. 305. *Contra*: Davis v. Oregon, etc., R. Co., 8 Or. 172.

21. Hanrahan v. Manhattan R. Co., *supra*; Johnson v. Manhattan R. Co., 52 Hun (N. Y.), 111; Central, R., etc., Co. v. Smith, 80 Ga. 526.

22. Hipsley v. Kansas City, etc., R. Co., 88 Mo. 348; Gulf, etc., R. Co. v. Rowland, 82 Tex. 166; Missouri Pac. R. Co. v. Mitchell, 75 Tex. 77.

23. Joliet St. R. Co. v. Call, 42 Ill. App. 41.

24. Meloy v. Chicago, etc., R. Co. (Iowa), 37 N. W. 335.

25. Gilbert v. Third Ave. R. Co., 54 N. Y. Super. Ct. 470; Chicago, etc., R. Co. v. Champion (Ind.), 32 N. E. 874.

26. N. Y.—Dale v. Delaware, etc.,

R. Co., 73 N. Y. 468; Dougan v. Champlain Transp. Co., 56 N. Y. 1; Reed v. New York Cent. R. Co., 45 N. Y. 574; Timpson v. Manhattan R. Co., 1 N. Y. Supp. 673; Schmitt v. Dry Dock, etc., R. Co., 3 St. Rep. (N. Y.) 257; Delaney v. Hilton, 50 N. Y. Super. Ct. 341.

*Minn.*—Morse v. Minneapolis, etc., R. Co., 30 Minn. 465. But see Kelly v. Southern Minnesota R. Co., 28 Minn. 98; Phelps v. Mankato, 23 Minn. 276; O'Leary v. Mankato, 21 Minn. 65.

*Mo.*—Hipsley v. Kansas City, etc., R. Co., 88 Mo. 348; Ely v. St. Louis, etc., R. Co., 77 Mo. 34.

*Or.*—Skottowe v. Oregon Short Line, etc., R. Co., 22 Or. 430, but such evidence is admissible to show the authority of the carrier over the place in which the repairs were made.

being liable to have such acts construed as an admission of prior negligence. To so construe such an act would be an unfair interpretation of human conduct and virtually an inducement for continued negligence.<sup>27</sup> But such evidence has been held admissible in some jurisdictions.<sup>28</sup>

### § 5. Custom or habit of carrier or passenger.

Where the direct testimony as to the alleged negligent act is conflicting, evidence as to what was the usual stopping place of a train or car,<sup>29</sup> or what was the usual or customary time for trains or cars to stop,<sup>30</sup> or as to the habit of the injured person in alighting from a moving train or car, in despite of warning,<sup>31</sup> or as to the practice of the carrier in regard to the approaches to its trains,<sup>32</sup> or the general use of the same by the public,<sup>33</sup> is admissible. Evidence as to the custom or habit of passengers in alighting from or boarding trains and of the carrier's slowing trains but not coming to a full stop for this purpose, is admissible as bearing upon the carrier's duty to take proper precautions for the safety of its passengers.<sup>34</sup> But the occasional act of a passenger without the knowledge or consent of the carrier would not affect the rights and duties of a carrier.<sup>35</sup>

27. *Payne v. Troy, etc., R. Co.*, 9 Hun (N. Y.) 526; *Morse v. Minneapolis, etc., R. Co.*, 30 Minn. 465.

28. *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Augusta, etc., R. Co. v. Renz*, 55 Ga. 126, evidence competent for the consideration of the jury, subject to being explained by the defendant; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, for the purpose of showing the actual condition of the track; *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, inadmissible to prove prior negligence, but admissible to rebut defendant's testimony as to track being in safe condition; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, admissible to show that prior construction was defective.

29. *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193.

30. *Fuller v. Naugatuck R. Co.*, 21 Conn. 557.

31. *Craven v. Central Pac. R. Co.*, 72 Cal. 345; *Louisville, etc., R. Co. v. Berry*, 88 Ky. 222, but such evidence is not admissible when the proofs show that the injury was due to a defective platform.

32. *Wentworth v. Eastern R. Co.*, 143 Mass. 248.

33. *McDonald v. Chicago, etc., R. Co.*, 29 Iowa, 170.

34. *Phillips v. Rensselaer, etc., R. Co.*, 57 Barb. (N. Y.) 644, 49 N. Y. 177.

35. *Drake v. Pennsylvania R. Co.*, 137 Pa. St. 352.

Evidence as to the usual rate of speed is admissible on the question as to whether the rate of speed was negligent.<sup>36</sup> Evidence of the carrier's departure from its usual practice may be admissible to show negligence.<sup>37</sup> Evidence of the habit of passengers on the road of a street car company to give signal for stopping and starting cars is inadmissible in an action for an injury to a passenger caused by the sudden starting of the car while she was alighting in response to a signal by one of the passengers.<sup>38</sup>

### § 6. Tickets as evidence of contract for transportation.

Tickets for passage over a carrier's road are not, in themselves, written evidence of the contract by which the transportation was engaged, and the passenger is not precluded from contradicting, varying, or explaining them by parol testimony as to the actual contract with the carrier. They are rather in the nature of vouchers or receipts for the passage money and their office is to serve as tokens to enable the person having charge of the vessels and carriages of the carrier to recognize the bearers as parties who are entitled to be received on board and to passage as thereon indicated. They are quite consistent with a more special bargain. They do not come within the rule which excludes parol testimony respecting a contract which has been reduced to writing.<sup>39</sup> The fact that a passenger bought a ticket over several lines of road with coupons attached may be shown by parol, the contents of the ticket not being involved.<sup>40</sup> There is no such necessity of the sleeping car service, or such sufficient reason, for giving the berth check issued to passengers on a sleeping car upon the surrender of their tickets

36. *Cleveland, etc., R. Co. v. Newell*, 75 Ind. 542.

37. *Chicago, etc., R. Co. v. Fisher*, 31 Ill. App. 36.

38. *Nichols v. Lynn & B. R. Co.*, 168 Mass. 528, 47 N. E. 427.

39. *Elmore v. Sands*, 54 N. Y. 515, 13 Am. Rep. 617; *Van Buskirk v. Roberts*, 31 N. Y. 663; *Quimby v.*

*Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *New York, etc., R. Co. v. Winter*, 143 U. S. 60; *Gordon v. Manchester, etc., R. Co.*, 52 N. H. 596; *Johnson v. Concord R. Corp.*, 46 N. H. 213. But see *Memphis, etc., R. Co. v. Benson*, 85 Tenn. 627.

40. *Central R. Co. v. Wolff*, 74 Ga. 664.

conclusive force as evidence of the contract between the passenger and the sleeping car company, as to exclude parol evidence of the agreement made between the conductor and the passenger.<sup>41</sup>

### § 7. Declarations and admissions of injured passengers.

The *res gestae*, speaking generally, is the accident, and declarations of the injured person as to the circumstances of the occurrence, which are no part of it, which were not made at the same time, or so nearly contemporaneous with it as to characterize it, or to throw any light on it, are not admissible in evidence as part of the *res gestae*. They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed.<sup>42</sup> The statements of an injured person as to how or why an accident occurred, or as to the cause of his injuries, or the manner in which they were inflicted, unless made at the time of the accident, or while the transaction was in progress so as to constitute a part of the occurrence itself, are generally held to be inadmissible.<sup>43</sup> Such statements have been held to be admissible in certain cases, however, even though made a few moments after the accident, where the courts have regarded the declarations as verbal acts or facts illustrating, explaining, interpreting, or growing out of the transaction, and a part of the *res gestae*, or receiving support from the

41. Mann Boudoir Car Co. v. Dupre, 54 Fed. 646, 47 Alb. L. J. 446.

42. Waldele v. New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Martin v. New York, etc., R. Co., 103 N. Y. 626; Downs v. New York Cent., etc., R. Co., 47 N. Y. 83; Savannah, etc., R. Co. v. Holland, 82 Ga. 257; Augusta, etc., R. Co. v. Randall, 79 Ga. 304; Chicago, etc., R. Co. v. Johnson, 36 Ill. App. 564; Sullivan v. Oregon R., etc., Co., 12 Or. 392.

43. Hall v. Cedar Rapids, etc., R. Co., 115 Iowa, 8, 87 N. W. 739; Edwards v. Foote (Mich.), 88 N. W.

404, 8 Det. L. N. 880; Perhnutter v. Highland St. Ry. Co., 121 Mass. 497; Leahey v. Cass Ave., etc., R. Co., 97 Mo. 165, 10 Am. St. Rep. 300; Chicago W. D. Ry. Co. v. Becker, 128 Ill. 545, 21 N. E. 524; Webber v. St. Paul City R. Co., 67 Minn. 155, 69 N. W. 716; Citizens St. R. Co. v. Stoddard (Ind. App.), 37 N. E. 723. See also Nellis St. Rd. Acct. Law, p. 565; Illinois Cent. R. Co. v. Sutton, 42 Ill. 438; Fordyce v. McCants, 51 Ark. 509, declarations to attending physician.

transaction itself.<sup>44</sup> Declarations of an injured person, indicative of existing pain or suffering, made at the time of the injury or afterwards, are competent evidence in an action to recover for personal injuries, although a narrative of how the injuries were received is not.<sup>45</sup> The fact that parties are now permitted to be witnesses in their own behalf has been held in New York not to have changed the rule of evidence which made it competent, in actions for personal injuries, for the plaintiff to prove screaming or other exclamations tending to show suffering, uttered at the time of the injury or immediately after the accident.<sup>46</sup> But, in

44. *O'Keefe v. Eighth Ave. R. Co.*, 33 App. Div. (N. Y.) 324, 53 N. Y. Supp. 940; *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. Rep. 701; *International, etc., R. Co. v. Smith (Tex.)*, 44 Am. & Eng. R. Cas. 324; *Washington, etc., R. Co. v. McLane*, 11 App. D. C. 220, 25 Wash. L. Rep. 485; *Houston, etc., R. Co. v. Loeffler (Tex.)*, 51 S. W. 526.

**Rebuttal.**—Where evidence is given tending to impeach the testimony of the injured person and show it to be an after-thought and a fabrication of recent invention, the witness may properly be permitted to show, in answer thereto, that he told the same story at the time of the accident. *Baber v. Broadway, etc., R. Co.*, 9 Misc. Rep. (N. Y.) 20, 29 N. Y. Supp. 40.

45. *Montgomery St. Ry. Co. v. Shanks*, 3 St. Ry. Rep. 12, 139 Ala. 489, 37 So. 166; *Beddle v. City Elec. R. Co.*, 112 Mich. 547, 70 N. W. 1096; *Harris v. Detroit City R. Co.*, 76 Mich. 227, 42 N. W. 1111; *Winter v. Central I. R. Co.*, 74 Iowa, 448, 38

N. W. 154, and the statute making a party a competent witness does not abridge his right to have such declarations introduced in evidence; *Hancock v. Leggett*, 115 Ind. 544, 18 N. E. 53; *Bridge v. Oshkosh*, 71 Wis. 363, 37 N. W. 409; *Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365; *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8, 8 So. 142; *Laughlin v. Grand Rapids St. R. Co.*, 80 Mich. 154; *Mott v. Detroit, etc., R. Co.*, 120 Mich. 127, 79 N. W. 3; *Beath v. Rapid R. Co.*, 119 Mich. 512, 78 N. W. 537; *Brown v. Hannibal, etc., R. Co.*, 66 Mo. 588; *Texas, etc., R. Co. v. Barron*, 78 Tex. 421.

46. *Hagenlocher v. Coney Island, etc., R. Co.*, 99 N. Y. 136, 1 N. E. 536; *Nichols v. Brooklyn City R. Co.*, 30 Hun (N. Y.), 437, *affd.* 100 N. Y. 635; *Murphy v. New York Cent. R. Co.*, 66 Barb. (N. Y.) 125; *DeLong v. Delaware, etc., R. Co.*, 37 Hun (N. Y.), 282; *Lewke v. Dry Dock, etc., R. Co.*, 46 Hun (N. Y.), 283; *Uransky v. Dry Dock, etc., R. Co.*, 44 Hun (N. Y.), 119; *Geiler v. Manhattan R. Co.*, 11 Misc. Rep. (N. Y.) 413, 65 St. Rep. (N. Y.) 437,



that State, declarations made by the injured person some time after the injury to persons other than the physician in attendance upon the person injured, simply that he or she is then suffering pain, are held to be not a part of the *res gestae*, and, therefore, incompetent, although such evidence was admissible prior to the statute allowing parties to be witnesses.<sup>47</sup> It is also held that statements expressive of present condition are allowed in evidence only when made to a physician for the purpose of treatment by him.<sup>48</sup> In other States it has been held that expressions or complaints showing bodily suffering made at the time of the injury or soon thereafter, are competent evidence as part of the *res gestae*, and may be testified to and described by any person in whose presence they were uttered, if they were made at the time of the suffering.<sup>49</sup> Even dying declarations are not received in civil

32 N. Y. Supp. 254. See *Griffith v. Utica, etc., R. Co.*, 63 Hun (N. Y.), 626, 17 N. Y. Supp. 692, *affd.* 137 N. Y. 566, may prove by physician her appearance when she reached home and he first examined her.

47. *Kennedy v. Rochester, etc., R. Co.*, 130 N. Y. 654, 41 St. Rep. (N. Y.) 329; *Roche v. Brooklyn, etc., R. Co.*, 105 N. Y. 294; *Donohue v. Brooklyn, etc., R. Co.*, 53 App. Div. (N. Y.) 348, 65 N. Y. Supp. 634; otherwise, before the Code; *Matteson v. N. Y. Cent. R. Co.*, 35 N. Y. 487; *Caldwell v. Murphy*, 11 N. Y. 416; *Brown v. N. Y. Cent. R. Co.*, 32 N. Y. 597; *Fuller v. Jamestown St. R. Co.*, 75 Hun (N. Y.), 273, such testimony is, however, admissible in rebuttal.

48. *Kennedy v. Rochester, etc., R. Co.*, *supra*; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573. See *contra*, *Matteson v. N. Y. Cent. R. Co.*, *supra*, holding that such expressions of pain, made to a physician examining the

injured person with a view of giving evidence, are admissible; *Schuler v. Third Ave. R. Co.*, 1 Misc. Rep. (N. Y.) 351, 48 St. Rep. (N. Y.) 663, 20 N. Y. Supp. 683.

49. *Williams v. Great Northern R. Co.*, 68 Minn. 55, 70 N. W. 860; *Brush v. St. Paul City R. Co.*, 52 Minn. 572, 55 N. W. 57; *Omaha St. R. Co. v. Emminger*, 57 Neb. 240, 77 N. W. 675, 12 Am. & Eng. R. Cas. N. S. 188; *Missouri, etc., R. Co. v. Sanders*, 12 Tex. Civ. App. 5, 33 S. W. 245; *Weiser v. Broadway, etc., R. Co.*, 10 Ohio C. C. 14, 2 Ohio Dec. 463; *Heckle v. Southern Pac. Co.*, 123 Cal. 441, 5 Am. Neg. Rep. 298, 56 Pac. 56; *Springfield Consol. R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884. But see *West Chicago St. R. Co. v. Kennelly*, 170 Ill. 508, 48 N. E. 996, 9 Am. & Eng. R. Cas. N. S. 359, *affg.* 66 Ill. App. 244; *West Chicago St. R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992.

actions unless part of the *res gestae*, and come within the rule already stated.<sup>50</sup> Admissions of the passenger that the injuries received by him were caused by his own negligence are admissible in evidence against him,<sup>51</sup> but are not conclusive and are subject to explanation.<sup>52</sup>

### § 8. Declarations and admissions of employes.

When the acts of employes or servants will bind the carrier the declarations or admissions of such employes or servants will also bind the carrier, if it affirmatively appear that they were made at the time of the injury to the plaintiff and constituted a part of the *res gestae*.<sup>53</sup> But declarations or admissions made subsequently to

50. *Waldele v. New York Cent., etc.*, R. Co., 95 N. Y. 274; *Daily v. New York, etc.*, R. Co., 32 Conn. 356; *East Tennessee, etc.*, R. Co. v. *Maloy*, 77 Ga. 237; *Marshall v. Chicago, etc.*, R. Co., 48 Ill. 475; *Brownell v. Pacific R. Co.*, 47 Mo. 239, admissible as *res gestae* when made almost instantly after the accident.

51. *Gulzoni v. Tyler*, 64 Cal. 334; *De Mahy v. Morgan's Louisiana, etc.*, R. Co., 45 La. Ann. 1329; *Kellor v. Sioux City, etc.*, R. Co., 27 Minn. 178, but the silence of a wife when a husband is making such admission is not evidence against her.

52. *Zemp v. Wilmington, etc.*, R. Co., 9 Rich. L. (S. C.) 84.

53. N. Y.—*Koetter v. Manhattan El. R. Co.*, 59 Hun (N. Y.), 623, 13 N. Y. Supp. 458, affd. 129 N. Y. 668, 30 N. E. 65; *Butler v. Manhattan R. Co.*, 4 Misc. Rep. (N. Y.) 401, 3 Misc. Rep. (N. Y.) 453; *Matteson v. New York Cent. R. Co.*, 62 Barb. (N. Y.) 364.

U. S.—*New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637; *Vicks-*

*burg, etc.*, R. Co. v. *O'Brien*, 119 U. S. 99, 30 L. Ed. 299, 7 S. Ct. 118; *Union Insurance Co. v. Smith*, 124 U. S. 424; *Pierce v. Van Dusen*, 78 Fed. 706.

*Ala.*—*Chewing v. Ensley R. Co.*, 100 Ala. 493; *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45.

*Iowa.*—*Marion v. Chicago, etc.*, R. Co., 64 Iowa, 568.

*Ky.*—*McLeod v. Ginther*, 80 Ky. 399.

*Ill.*—*Springfield Consol. R. Co. v. Welsh*, 155 Ill. 511, 40 N. E. 1034.

*Kan.*—*Cherokee, etc., Coal Co. v. Dixon*, 55 Kan. 70, 39 Pac. 694.

*Colo.*—*Denver, etc.*, R. Co. v. *Dwyer*, 20 Colo. 132, 36 Pac. 1106; *Emerson v. Burnett*, 11 Colo. App. 88, 52 Pac. 753.

*Dak.*—*First National Bank v. North*, 6 Dak. 141, 41 N. W. 738.

*Mass.*—*Geary v. Stephenson*, 169 Mass. 31, 47 N. E. 509.

*Mich.*—*Joslin v. Grand Rapids, etc.*, R. Co., 53 Mich. 322, 19 N. W. 17; *Ensley v. Detroit United Ry. Co.*, 1 St. Ry. Rep. 380 (Mich.), 96 N. W.

the time of the injury are not part of the *res gestae*, and are not admissible in evidence against the carrier.<sup>54</sup> Declarations made before the accident are not a part of the *res gestae* and are inadmissible.<sup>55</sup> Declarations made by an employe who was not directly connected with the occurrence are inadmissible.<sup>56</sup> Evidence of a

34; *Hall v. Murdock*, 119 Mich. 392, 78 N. W. 330.

*Minn.*—*Beardsley v. Minneapolis St. R. Co.*, 54 Minn. 504, 56 N. W. 176.

*Mo.*—*Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 154, 72 S. W. 154; *Bergeman v. Indiana, etc., Ry.*, 104 Mo. 86, 15 S. W. 994.

*Neb.*—*Omaha, etc., R. Co. v. Chollette*, 41 Neb. 578.

*N. Dak.*—*Short v. Northern Pac. R. Co.*, 1 N. Dak. 164, 45 N. W. 707.

*Pa.*—*Coll v. Easton Trans. Co.*, 180 Pa. St. 618, 37 Atl. 89; *Bayles v. Diamond St. Omnibus Co.*, 173 Pa. St. 378.

*Tex.*—*Gulf, etc., R. Co. v. Pierce*, 7 Tex. Civ. App. 597.

*Wis.*—*Robinson v. Superior R. T. Ry. Co.*, 94 Wis. 345, 68 N. W. 961, 59 Am. St. Rep. 897; *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

*W. Va.*—*Sample v. Consol. L. & Ry. Co.*, 50 W. Va. 472, 40 S. E. 597, 24 Am. & Eng. R. Cas. N. S. 389. See also *Nellis St. Rd. Acct. Law*, p. 558.

54. *N. Y.*—*Whittaker v. Eighth Ave. R. Co.*, 51 N. Y. 295; *Hendricks v. Sixth Ave. R. Co.*, 44 N. Y. Super. Ct. 8.

*U. S.*—*Vicksburg, etc., R. Co. v. O'Brien*, 119 U. S. 99.

*Ala.*—*Alabama G. S. R. Co. v. Hawk*, 72 Ala. 112.

*Cal.*—*Boone v. Oakland Trans. Co.*,

1 St. Ry. Rep. 14 (Cal.), 73 Pac. 243.

*Ill.*—*Mobile, etc., R. Co. v. Klein*, 43 Ill. App. 63; *Chicago, etc., R. Co. v. Fillmore*, 57 Ill. 265; *Springfield Consol. Ry. Co. v. Punttenney*, 101 Ill. App. 95, affd. 65 N. E. 442.

*Ky.*—*Chesapeake, etc., R. Co. v. Reeves (Ky.)*, 11 S. W. 464; *Louisville, etc., R. Co. v. Ellis*, 97 Ky. 330.

*Mass.*—*Williamson v. Cambridge R. Co.*, 144 Mass. 148, 10 N. E. 790.

*Mich.*—*Patterson v. Wabash, etc., R. Co.*, 54 Mich. 91; *Gardner v. Detroit St. R. Co.*, 99 Mich. 182, 58 N. W. 49.

*Minn.*—*Reem v. St. Paul City R. Co. (Minn.)*, 80 N. W. 638.

*Miss.*—*Forsce v. Alabama G. S. R. Co.*, 63 Miss. 66; *Moore v. Chicago, etc., R. Co.*, 59 Miss. 243.

*Mo.*—*Ruschenberg v. Southern El. Ry. Co.*, 161 Mo. 70, 61 S. W. 626.

*N. J.*—*Blackman v. West Jersey & S. R. Co. (N. J.)*, 52 Atl. 370.

*Tex.*—*Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 10 Am. St. Rep. 758.

*Wis.*—*Milwaukee, etc., R. Co. v. Finney*, 10 Wis. 388.

55. *Louisville, etc., R. Co. v. Stewart*, 56 Fed. 808; *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15; *San Antonio, etc., R. Co. v. Robinson*, 73 Tex. 277.

56. *Metropolitan R. Co. v. Collins*, 1 App. Cas. (D. C.) 383, 21 Wash. L. Rep. 811.

declaration is incompetent where the declaration is not a statement of a fact, but of the opinion or conjecture of the declarant, as the statement of a guard, "You must be injured," made immediately after the fall, to a passenger whom he helped up.<sup>57</sup> Reports by employes to their superior officers of the circumstances connected with an accident, made after the event and in accordance with rules or special orders of the carrier, are not admissible as *res gestae*.<sup>58</sup> The declaration of the driver of a street car to the officer arresting him, on a trip subsequent to that on which it was claimed he ran into plaintiff's wagon, that he was the man he was looking for, from which it could be inferred that he deemed himself at fault, and was seeking to make a voluntary surrender, is inadmissible.<sup>59</sup> Where the plaintiff was struck by a street car, and about fifteen minutes was occupied in extricating and caring for him at the place of the accident, when the motorman stated that he saw plaintiff, but thought he would get off the track, the statement was no part of the *res gestae*.<sup>60</sup>

### § 9. Declarations and conduct of other persons.

Evidence of the actions of other passengers and their exclamations at the time of the accident, and of the confusion among the passengers as a result thereof, is competent as a part of the *res gestae*, and also as evidence of what was deemed prudent by those

57. *De Soucey v. Manhattan R. Co.*, 15 N. Y. Supp. 108.

58. *Carroll v. East Tennessee, etc.*, R. Co., 82 Ga. 452; *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472; *North Hudson County R. Co. v. May*, 48 N. J. L. 401; *Nashville, etc.*, R. Co. v. *Messino*, 1 Sneed (Tenn.), 221. But see *Keyser v. Chicago, etc.*, R. Co., 66 Mich. 390.

59. *Seipp v. Dry Dock, etc.*, R. Co., 45 App. Div. (N. Y.) 489, 61 N. Y. Supp. 409; *Luby v. Hudson R. R. Co.*, 17 N. Y. 131; *Maisels v. Dry*

*Dock, etc.*, R. Co., 16 App. Div. (N. Y.) 391; *Anderson v. Rome, etc.*, R. Co., 54 N. Y. 334; *Little Rock Tract. & E. Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7.

60. *Citizens St. R. Co. v. Howard*, 102 Tenn. 474, 52 S. W. 863; *Williamson v. Cambridge R. Co.*, 144 Mass. 148, 10 N. E. 790; *Adams v. Hannibal, etc.*, R. Co., 74 Mo. 553; *Tennis v. Interstate, etc.*, R. Co., 45 Kan. 503, 25 Pac. 876; *Railroad Co. v. Stein* (Ind.), 31 N. E. 180.

in the same situation as the injured person, having an interest to take the least and avoid the greater hazard.<sup>61</sup> Evidence of the outcries of bystanders on the occasion has also been held admissible.<sup>62</sup> But statements made after the accident as to the circumstances are inadmissible.<sup>63</sup> Evidence of injuries to other passengers or that they were uninjured is not admissible on the question as to the extent of the plaintiff's injury.<sup>64</sup>

61. *Hallahan v. New York, etc., R. Co.*, 102 N. Y. 194, 26 Am. & Eng. R. Cas. 169; *Twomley v. Central Park, etc., R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162; *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62; *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15; *Galena, etc., R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323; *Hemmingway v. Chicago, etc., R. Co.*, 72 Wis. 42, 7 Am. St. Rep. 823.

62. *Kleiber v. Peoples R. Co.*, 107 Mo. 240; *Shirley v. Billings*, 8 Bush (Ky.), 147.

63. *Metropolitan R. Co. v. Collins*, 1 App. Cas. (D. C.) 383; *Keller v. Sioux City, etc., R. Co.*, 27 Minn. 178; *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409.

64. *Levy v. Campbell (Tex.)*, 19 S. W. 438.

**Declaration of bystander as evidence.**—In an action by a person

who was injured while riding a bicycle along the defendant's tracks, by a collision with one of the defendant's street cars, remarks made by a person who witnessed the accident, to the motorman after he had stopped the car, are inadmissible. *Indianapolis St. Ry. Co. v. Taylor*, 3 St. Ry. Rep. 151 (Ind.), 72 N. E. 1045. In an action to recover damages for an alleged unwarranted ejection from a street car, statements made by persons who saw the affair to the defendant's agent employed to investigate accidents were held inadmissible. *Foster v. Atlanta Rapid Transit Co.*, 2 St. Ry. Rep. 75, 119 Ga. 675, 46 S. E. 840; statement of passenger, *Boone v. Oakland Transit Co. (Cal.)*, 1 St. Ry. Rep. 14, 73 Pac. 243. See also notes on Declarations as to cause of accident, 3 St. Ry. Rep. pp. 153 to 160.

## CHAPTER XXIX.

### CONTRIBUTORY NEGLIGENCE.

- SECTION**
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  29. Alighting from train or cars in motion.
  30. Alighting from moving car on failure to stop at station.
  31. Alighting from moving car on failure to stop for sufficient time.
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### § 1. Contributory negligence must be proximate cause of injury.

The contributory negligence of a plaintiff, in order to defeat a recovery by him, must have contributed proximately to the injury.<sup>1</sup> Thus a passenger may recover for injuries sustained by reason of defendant's negligence just after alighting from the car, although plaintiff was negligent in leaving the car while in motion;<sup>2</sup> the passenger's negligence in going to the platform of a car while it is still moving, does not affect his right to recover for an injury suffered in properly alighting from the train after it has stopped;<sup>3</sup> or when he has left the train and is standing on the ground when he is injured;<sup>4</sup> nor the fact that plaintiff was acting at the time in disobedience of a proper order to secure his safety, if it does not appear that the injury was caused by such disobedience.<sup>5</sup> So, the carrier will become liable, if, after becoming aware of plaintiff's danger through his own negligence, it could have prevented the injury by the use of ordinary skill, care, and caution, and failed to do so, or, if the injury would not have occurred but for an affirmative act of negligence on the part of the carrier.<sup>6</sup>

1. *Van Ostran v. New York Cent., etc.*, R. Co., 35 Hun (N. Y.), 590, 104 N. Y. 683; *Hofnagle v. New York Cent., etc.*, R. Co., 55 N. Y. 608; *Troy v. Vermont, etc.*, R. Co., 24 U. S. 487, 58 Am. Dec. 191; *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Windsor*, 118 Mass. 251; *Crain v. Petrie*, 6 Hill (N. Y.), 522; *Culhane v. New York Cent., etc.*, R. Co., 60 N. Y. 133; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; *McQuilken v. Central Pac. R. Co.*, 64 Cal. 463, 16 Am. & Eng. R. Cas. 353; *Hansom v. Mansfield R., etc.*, Co., 38 La. Ann. 111, 58 Am. Rep. 162; *Central R. Co. v. Van Horn*, 38 N. J. L. 133; *Thirteenth, etc.*, St. Pass. R. Co., 92 Pa. St. 475, 37 Am. Rep. 707, 2 Am. & Eng. R. Cas. 30; *Conroy v. Pennsylvania R. Co.*, 1

*Pittsb. (Pa.)* 440; *Moakler v. Willemette Valley R. Co.*, 18 Or. 189, 17 Am. St. Rep. 717.

2. *Van Ostran v. New York Cent., etc.*, R. Co., 35 Hun (N. Y.), 590, 104 N. Y. 683; *Central R. Co. v. Smith*, 74 Md. 212.

3. *Wood v. Lake Shore, etc.*, R. Co., 49 Mich. 370, 8 Am. & Eng. R. Cas. 478; *Lackawanna, etc.*, R. Co. v. *Chenewith*, 52 Pa. St. 382, 91 Am. Dec. 168.

4. *Gadsden, etc.*, R. Co. v. *Causler*, 97 Ala. 235, 58 Am. & Eng. R. Cas. 258.

5. *Lawrenceburgh, etc.*, R. Co. v. *Montgomery*, 7 Ind. 474.

6. *Pennsylvania R. Co. v. Reed*, 60 Fed. 694; *Montgomery, etc.*, R. Co. v. *Stewart*, 91 Ala. 421; *Kentucky Cent.*

But if the negligence of a passenger amounting to absence of ordinary care, concurrently with the negligence of the carrier, proximately contributed to the injury, it is a good defense, whether the carrier could or could not, with ordinary or even extraordinary care, have guarded against it.<sup>7</sup>

If the injured person and the carrier were equally negligent, there can be no recovery.<sup>8</sup> Negligence of an alighting or boarding passenger does not preclude recovery for an injury, unless it constituted the proximate cause of the injury.<sup>9</sup> The act of a passenger who boarded the wrong train through the actionable negligence of the carrier failing to inform passengers of the movements and destination of trains, in alighting while the car was in motion, without being directed, advised, or encouraged so to do, by the trainmen, was the act of a responsible agent intervening between the negligence of the carrier and the injury sustained while alighting, precluding a recovery therefor.<sup>10</sup> The act of the motorman in

R. Co. v. Dills, 4 Bush (Ky.), 593; Straus v. Kansas City, etc., R. Co., 72 Mo. 414; Price v. St. Louis, etc., R. Co., 75 Mo. 414; Whalen v. St. Louis, etc., R. Co., 60 Mo. 323.

7. Tobin v. Omnibus Cable Co. (Cal.), 34 Pac. 124, 58 Am. & Eng. R. Cas. 223.

8. Pickett v. Central of Ga. Ry. Co., 138 Ga. 177, 74 S. E. 1027.

9. Kearney v. Seaboard Air Line Ry., 158 N. C. 521, 71 S. E. 593, where a passenger was injured by the sudden moving of the train while he was alighting, he could recover, though he was leaving on the opposite side of the train from the station, and on the side where passengers were not accustomed to alight.

Where the injury to a passenger received while attempting to board a moving train was not caused by any of the ordinary dangers incident to

boarding a moving train, but was caused by a trunk which the trainmen had placed near the track, the act of the passenger in attempting to board the moving train was not of itself the proximate cause of the injury. Roberts v. Atlantic Coast Line R. Co., 155 N. C. 79, 70 S. E. 1080.

10. Chesapeake & O. Ry. Co. v. Wills, 111 Va. 32, 68 S. E. 395.

Where a person was accompanying his daughter to a train upon which she was a passenger, though the carrier negligently started the train before he had time to alight, its negligence in such respect had ceased to operate when he attempted to alight from the moving train of his own accord, and his voluntary act in doing so was the proximate cause of his resultant injury, and the carrier was not liable therefor, though the brakeman in attempting to restrain his alighting may



closing the gate while plaintiff was attempting to get on board and not the taking hold of the gate by the plaintiff, was the proximate cause of the injury.<sup>11</sup> Where plaintiff negligently miscalculated the distance from the platform to the first step in alighting from a car so as to catch and hold her heel in a crack in the edge of the platform in stepping down, causing her to wrench her leg, her negligence proximately contributed to her injury so as to bar a recovery.<sup>12</sup> A passenger on a street car, which entered a switch to wait for the passing on the main track of a car running in the opposite direction, alighted therefrom intending to pass around the rear of the car and walk across the main track. The street was not paved, and she stumbled and fell headlong across the space between the two tracks, and at almost the same instant the car on the main track passed, and its fender struck her. It did not appear that her stumbling resulted from any negligence on her part. It was held that her contributory negligence was a question for the jury.<sup>13</sup> If the voluntary intoxication of a passenger was the direct and proximate cause of his injury, the carrier is not liable; but if it was simply a condition which was well known to defendant's servants, and their act was the direct and proximate cause of the injury, the carrier is liable.<sup>14</sup> To exculpate a carrier from liability for injury to a passenger, the passenger's negligence must have been such as materially contributed to the accident.<sup>15</sup> In an action for injuries to a passenger as he was walking through a railroad yard approaching a train he was about

have unbalanced him and thereby contributed to his injury. *Chesapeake & O. Ry. Co. v. Paris' Adm'r*, 111 Va. 41, 68 S. E. 398.

11. *Stevenson v. Joline*, 111 N. Y. Supp. 698, 127 App. Div. 181.

12. *Hertzberg v. San Antonio Traction Co.* (Tex. Civ. App.), 120 S. W. 572.

13. *Bloom v. Sioux City Traction Co.*, 148 Iowa, 452, 126 N. W. 1107, revg. judg. 122 N. W. 831.

14. *Black v. New York, etc., R. Co.*, 193 Mass. 448, 79 N. E. 797, 7 L. R. A. (N. S.) 148.

That a street car passenger was intoxicated would not prevent a recovery for injuries caused by derailment; his intoxication not contributing thereto. *Coburn v. Moline, E. M. & W. Ry. Co.*, 243 Ill. 448, 90 N. E. 741.

15. *Yazoo & M. V. R. Co. v. Byrd*, 89 Miss. 308, 42 So. 286.

to take by an engine striking him from the rear, evidence of defendant's failure to ring the bell or blow the whistle was at most negligence concurring with plaintiff's own contributory negligence.<sup>16</sup> The conduct of an elderly woman passenger once safely on a train, in attempting to alight to ascertain whether such train is the right one, where no one had entered the car for some ten minutes and there was no one in charge, is not the intervention of a new proximate cause of her injury by falling from the car platform which will relieve the carrier from liability for its negligent failure to light the station grounds properly.<sup>17</sup>

The act of the conductor of a street railway summer car requiring the motorman to stop it in such way as to produce a violent lurch and backward motion was the proximate cause of injury to a passenger thrown to the street by the lurch, where, when the conductor gave the signal, he might reasonably have expected that the passenger would at once, before the stop was made, take a position at the edge of the car preparatory to alighting, as she did.<sup>18</sup>

Where, in an action against a carrier for injuries to a passenger, the court submitted the issue of contributory negligence, based on the passenger running after a car, and on her failure to summon a physician after the injuries, and stated that, if the passenger suffered an injury because of the failure to take proper care and obtain the services of a physician, there could be no recovery, and the jury on ample evidence found in favor of the passenger, the refusal to grant a new trial, on the ground that the injuries were not the proximate result of the carrier's negligence, was proper.<sup>19</sup>

Although a passenger may be negligent in standing on the running board of a car, if the gripman, knowing of his dangerous

16. *Kaiser v. Northern Pac. Ry. Co.*, 203 Fed. 933.

17. *Texas & P. R. Co. v. Stewart*, 228 U. S. 357, 33 Sup. Ct. 548, 57 L. Ed. —.

18. *Richmond St. & I. Ry. Co. v. Beverley*, 43 Ind. App. 105, 84 N. E. 558, rehearing denied 85 N. E. 721.

19. *Citizens' Ry. Co. v. Griffin* (Tex. Civ. App.), 109 S. W. 999.

position, and that there is danger of his striking a wagon which the car is about to pass, takes no precautions for his safety, and he is injured, the proximate cause of the injury is the negligence of the carrier.<sup>20</sup> If a passenger takes a position of danger and is thereby negligent, such negligence does not amount to contributory negligence which will bar his recovery if it does not proximately result in the injury.<sup>21</sup> But, if a passenger, injured by the running of a carrier's train, had a "clear chance" to avoid the consequences of the carrier's negligence, he could have avoided such negligence by the exercise of ordinary care, and hence could not recover.<sup>22</sup> In an action by a passenger on a freight train for injuries from a collision while he was occupying the caboose cupola, where it appeared that others not occupying the cupola were also injured, a charge that, if his occupying the cupola contributed "in any way whatsoever" to the injury, he could not recover, though defendant was grossly negligent, etc., was erroneous, since it was only such negligence of plaintiff as contributed proximately to produce the injury that would bar his recovery.<sup>23</sup>

## § 2. Acts in disregard of warning or disobedience of carrier's rules.

A warning to the passenger by the carrier through its servants or otherwise not to do a certain act or occupy a certain position which exposes him to danger, and his disregard thereof, will, in the absence of a good reason for it, prevent his recovery from the carrier for an injury growing out of it, although the carrier may also be negligent.<sup>24</sup> So, if a passenger is injured by reason of his

20. *Vessels v. Metropolitan St. Ry. Co.*, 129 Mo. App. 708, 108 S. W. 578.

21. *Hickey v. Chicago City Ry. Co.*, 148 Ill. App. 197.

22. *Jackson v. Georgia R., etc., Co.*, 7 Ga. App. 644, 67 S. E. 898.

23. *Reid v. Yazoo & M. V. R. Co.*, 94 Miss. 639, 47 So. 670.

24. *Campbell v. Los Angeles R. Co.*,

135 Cal. 137, 67 Pac. 50; *Dodge v. Boston, etc., Steamship Co.*, 148 Mass. 207, 37 Am. & Eng. R. Cas. 67; *Ohio, etc., R. Co. v. Schiebe*, 44 Ill. 460; *Blake v. Burlington, etc., R. Co.*, 73 Iowa, 57, 39 Am. & Eng. R. Cas. 405; *Fulks v. St. Louis, etc., R. Co.*, 111 Mo. 335, 52 Am. & Eng. R. Cas. 280; *State v. Tom*, 8 Or. 177; *Pennsylv.*

disobedience of the reasonable rules and regulations of the carrier, he cannot hold the carrier liable for an injury attributable in part to the carrier's negligence since there is an implied agreement in the contract of carriage that the passenger will obey the reasonable rules of the carrier.<sup>25</sup> But a passenger is not guilty of contributory negligence who, in ignorance of a rule of a carrier, acts in violation of it.<sup>26</sup> Where the regulation of the carrier is known to the passenger, or the circumstances are such as to imply notice or to be equivalent to actual notice, the violation thereof, although by the permission, knowledge, or connivance of the carrier's servants, constitutes contributory negligence.<sup>27</sup> But where the regulation is unknown to the passenger and he acts in violation

*vania R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323; *Jewett v. Chicago, etc., R. Co.*, 54 Wis. 610, 41 Am. Rep. 63, 6 Am. & Eng. R. Cas. 379; *Central of Ga. R. Co. v. McKinney*, 118 Ga. 535, 45 S. E. 430; *Rolette v. Great Northern R. Co.* (Minn.), 97 N. W. 431.

**25.** *Ala.*—Alabama, etc., R. Co. v. Hawk, 72 Ala. 112, 47 Am. Rep. 403.

*Cal.*—*Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62.

*Ill.*—Chicago, etc., R. Co. v. Rielly, 40 Ill. App. 416.

*Iowa.*—*McDonald v. Chicago, etc., R. Co.*, 26 Iowa, 124, 96 Am. Dec. 114.

*Ohio.*—Cincinnati, etc., R. Co. v. Lohe (Ohio), 67 N. E. 161.

*Md.*—Baltimore, etc., Turnpike Road Co. v. Leonhardt, 66 Md. 70; *Western Maryland R. Co. v. Herold*, 74 Md. 510.

*Mo.*—Whitehead v. St. Louis, etc., R. Co., 22 Mo. App. 60.

*Pa.*—Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21, 37 Am. Rep. 651.

*Va.*—Virginia Midland R. Co. v. Roach, 83 Va. 375.

*W. Va.*—Downey v. Chesapeake, etc., R. Co., 28 W. Va. 732.

*Tex.*—Houston, etc., R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98.

**26.** New York, etc., R. Co. v. Ball, 53 N. J. L. 283, 21 Atl. 1052; *Hanson v. Mansfield, etc., R. Co.*, 38 La. Ann. 111, 58 Am. Rep. 162; *McDonald v. Chicago, etc., R. Co.*, 26 Iowa, 124, 96 Am. Dec. 114; *Western Maryland R. Co. v. Herold*, 74 Md. 510.

**27.** *Eaton v. Delaware, etc., R. Co.*, 57 N. Y. 382, 15 Am. Rep. 313; *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21, 37 Am. Rep. 651; *Florida Southern R. Co. v. Hirst*, 30 Fla. 32, 32 Am. St. Rep. 17; *Files v. Boston, etc., R. Co.*, 149 Mass. 204, 14 Am. St. Rep. 411.

Knowledge will be presumed from previous employment by the carrier; *Pennsylvania, etc., R. Co. v. Langdon, supra*; *Houston, etc., R. Co. v. Clemmons*, 55 Tex. 88, 40 Am. Rep. 799; *Virginia Midland R. Co. v. Roach*, 83 Va. 375.

thereof, under the direction or with the knowledge, consent or permission of the carrier's servant, he is not guilty of contributory negligence, which will preclude a recovery.<sup>28</sup> So, if the carrier fails to enforce the rule and permits it to be generally disregarded.<sup>29</sup> But the customary violation of a rule cannot avail a passenger who was requested by the carrier's employes to obey it.<sup>30</sup>

A person who disregards warnings and proceeds out of the regular way to reach a station platform for the purpose of taking a train there and is injured while crossing the tracks of the carrier on the right of way beyond the public street is not entitled to recover, notwithstanding it be shown that the way taken by such person to reach such station was one customarily taken by others.<sup>31</sup> Where a passenger stands on the vestibule of a car while in motion, and there are vacant seats in the car, and on request of the brakeman he refused to go inside, and when the doors are opened on approaching a station he falls out and is killed, the railroad company is not liable.<sup>32</sup> Where a street car on which plaintiff was riding became stalled on a railroad crossing, plaintiff was not bound to assist in moving the car from the track as invited by the motorman, but his failure to leave the car as directed by the conductor until just as it was struck by an engine was material on the issue of plaintiff's negligence.<sup>33</sup> A passenger on the caboose of a local freight, whose injury is contributed to by his getting up before the train stops, may be found guilty of contributory negligence in so doing after warning, though he did not hear the

28. *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, 18 Am. Rep. 360; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187, 4 Am. Rep. 267; *Jones v. Chicago, etc., R. Co.*, 43 Minn. 279; *Hanson v. Mansfield R., etc., Co.*, 38 La. Ann. 111, 58 Am. Rep. 162; *New York, etc., R. Co. v. Ball*, 53 N. J. L. 286.

29. *Chicago, etc., R. Co. v. Lowell*, 151 U. S. 209, 38 L. Ed. 131, 14

Sup. Ct. 281; *Jones v. Chicago, etc., R. Co.*, 43 Minn. 279; *New York, etc., R. Co. v. Ball*, 53 N. J. L. 286.

30. *Houston, etc., R. Co. v. Bryant (Tex. Civ. App.)*, 72 S. W. 885.

31. *Raymond v. Chicago, etc., Ry. Co.*, 126 Ill. App. 240.

32. *Rager v. Pennsylvania R. Co.*, 229 Pa. 335, 78 Atl. 827.

33. *Barnes v. Danville St. Ry. etc., Co.*, 235 Ill. 566, 85 N. E. 921.

conductor tell the passengers, after the train began to slow up, to keep their seats until the station was reached; there having been a notice in the car, headed in large capital letters, "Warning! Notice Danger!" which forbade passengers to stand up while the train was in motion, and he having previously frequently ridden on local freight trains, and known that similar warnings were posted in them.<sup>34</sup>

Where a passenger, with knowledge of the existence of a reasonable carrier's rule, violated it, and was injured, he could not recover, if his violation of the rule was a contributing cause of the injury; but a reasonable regulation adopted by a carrier for the safety of passengers, in order to be binding on a passenger, must have been brought to his knowledge, either expressly or by necessary implication.<sup>35</sup> Where a street railway has established a custom of hauling passengers on the platforms of its cars, it cannot escape liability for accidents to passengers riding thereon by posting a notice on the cars that it is dangerous to ride on the platforms.<sup>36</sup> Even though a carrier have a rule forbidding passengers from riding in the vestibules of its cars and even though notices prohibiting passengers from riding in such vestibules be posted in such cars, yet such facts will not preclude recovery by the passenger for injuries sustained while riding in such a vestibule if it appears from the evidence that such rule was abrogated by the carrier, and such notice was not seen by the passenger.<sup>37</sup> A rule that passengers must keep off the platform of moving cars is not inflexible, as a passenger may be compelled to be there.<sup>38</sup> Where a cattle shipper riding on free transportation agreed to remain in the caboose while the train was moving, to get off only when

34. *Abelson v. St. Louis, etc., Ry. Co.*, 84 Ark. 181, 105 S. W. 81.

35. *Renaud v. New York, etc., R. Co.*, 210 Mass. 553, 97 N. E. 98.

36. *Hart v. Capital Traction Co.*, 35 App. D. C. 502.

37. *Coburn v. Moline, etc., Ry. Co.*,

149 Ill. App. 132, judg. aff'd 243 Ill. 448, 90 N. E. 741. A passenger is not bound to use diligence to ascertain the carrier's rules. *Id.*

38. *Brice v. Southern Ry. Co.*, 85 S. C. 216, 67 S. E. 243.

it was stationary, and not to get on freight cars, he must ascertain whether he has time to examine his stock at stopping places, and return to the caboose before the train proceeds.<sup>39</sup> Though a railway company had a rule prohibiting the carriage of passengers on its freight trains without special authority, where plaintiff did not know of such rule, and was on the train by consent of the conductor, and the company knew or should have known that this rule was generally violated and did not object, it was liable for his negligent injury.<sup>40</sup> A notice that all persons are warned not to enter or leave a street car while in motion or by the front platform is not a notice that persons so entering or leaving the car do so at their own risk.<sup>41</sup> One who boards a crowded street car, knowing of a rule of the carrier that persons riding on the platforms do so "at their own risk," must be held to assume the risk of injury resulting from his attempting to again board the car after leaving it to enable others to alight, though the carrier's servants were negligent in starting the car.<sup>42</sup> Regulations of a carrier as to which platform shall be used for the purpose of alighting, which are in the form of instructions to its trainmen, are not binding upon a passenger, if not known to him.<sup>43</sup>

### § 3. Acts by permission or direction of carrier's employes.

Where a passenger acts by permission or consent, or by the advice, direction, request, or command of a conductor or person in charge of a train or car, or other employe or agent of the carrier,

39. *Leslie v. Atchison, etc., Ry. Co.*, 82 Kan. 152, 107 Pac. 765.

40. *St. Louis S. W. Ry. Co. of Texas v. Morgan* (Tex. Civ. App.), 98 S. W. 408.

See *Gray v. Columbia River, etc., R. Co.*, 49 Or. 18, 88 Pac. 297, holding that a contractor's servant when being carried free, in the performance of his duty, on a freight car, although in violation of the carrier's rule, was not guilty of contributory negligence,

when permitted to ride by the conductor.

41. *Cutts v. Boston Elec. Ry. Co.*, 202 Mass. 450, 89 N. E. 21, also holding that a notice containing a rule was not properly posted.

42. *Tompkins v. Boston Elev. Ry. Co.*, 201 Mass. 114, 87 N. E. 488, 20 L. R. A. (N. S.) 1063.

43. *Harley v. Aurora, etc., Ry. Co.*, 128 Ill. App. 643.

acting within the scope of his authority, and such action on his part will not lead him into or expose him to any known or apparent or obvious danger, such as an ordinarily prudent person would not assume, he will not be chargeable with contributory negligence, although his action may result in causing injury to himself.<sup>44</sup> Where for example, a passenger, under the direction of the conductor, gets off a slowly moving train;<sup>45</sup> or passes from the platform of one car to another.<sup>46</sup> But, while if the conditions which led the passenger into danger were of the carrier's own creation, both common sense and justice forbid that it should be allowed to withhold compensation, if, on the other hand, the danger, notwithstanding the permission, direction or solicitation of the carrier's servant, was so manifest that in the exercise of ordinary prudence the passenger should have observed it, or, if observing it, he voluntarily attempted an act obviously dangerous, he should be held guilty of

44. *N. Y.*—*Lent v. New York Cent., R. Co.*, 120 *N. Y.* 467; *Carroll v. New York, etc., R. Co.*, 1 *Duer (N. Y.)*, 584; *Schurr v. Houston*, 10 *St. Rep. (N. Y.)* 262.

*Ala.*—*Southern R. Co. v. Roebuck (Ala.)*, 31 *So.* 611; *Highland Ave., etc., R. Co. v. Winn*, 93 *Ala.* 309; *Montgomery, etc., R. Co. v. Stewart*, 91 *Ala.* 421; *South, etc., Alabama R. Co. v. Schaufler*, 75 *Ala.* 142.

*Ark.*—*St. Louis, etc., R. Co. v. Person*, 49 *Ark.* 182; *Little Rock, etc., R. Co. v. Miles*, 40 *Ark.* 298, 48 *Am. Rep.* 10; *St. Louis, etc., R. Co. v. Cantrell*, 37 *Ark.* 519, 40 *Am. Rep.* 105.

*Ill.*—*Hannibal, etc., R. Co. v. Martin*, 111 *Ill.* 219.

*Ind.*—*Louisville, etc., R. Co. v. Bisch*, 120 *Ind.* 549, 41 *Am. & Eng. R. Cas.* 589; *Louisville, etc., R. Co. v. Kelly*, 92 *Ind.* 371.

*Iowa.*—*Pence v. Wabash R. Co.*, 116 *Iowa*, 279, 90 *N. W.* 59.

*Mich.*—*McCaslin v. Lake Shore, etc., R. Co.*, 93 *Mich.* 553; *Clinton v. Root*, 58 *Mich.* 182, 55 *Am. Rep.* 671.

*Miss.*—*Davis v. Louisville, etc., R. Co.*, 69 *Miss.* 136.

*Ohio.*—*Pittsburgh, etc., R. Co. v. Krouse*, 30 *Ohio St.* 222.

*Pa.*—*Hartzig v. Lehigh Valley R. Co.*, 155 *Pa. St.* 364.

*Tenn.*—*Washburn v. Nashville, etc., R. Co.*, 3 *Head (Tenn.)*, 638, 75 *Am. Dec.* 784.

*Tex.*—*Gulf, etc., R. Co. v. Shelton (Tex. Civ. App.)*, 69 *S. W.* 653, 70 *S. W.* 359.

45. *Southern Ry. Co. v. Bandy*, 120 *Ga.* 463, 47 *S. E.* 923.

46. *Lent v. New York Cent., etc., R. Co.*, 120 *N. Y.* 467.



contributory negligence and should suffer the consequences of an injury brought on by himself.<sup>47</sup>

A street car conductor cannot waive a rule prohibiting persons from riding on the running board of a car.<sup>48</sup> Where a passenger, transferred because of an obstruction from one car to another, follows the course suggested by employes and is injured without fault, the injury is not chargeable to his negligence, unless the danger is obvious; where the directions of an employe are within the scope of his authority, and obedience thereto will not expose a passenger to apparent danger, the passenger is not guilty of contributory negligence in acting thereon though he may be injured thereby.<sup>49</sup> That a motorman jumped from the car, and advised the passengers to jump, to avoid a collision, justified a passenger in jumping, so as not to make her negligent in doing so.<sup>50</sup>

A passenger who obeyed the directions of the porter on the train to alight therefrom and remain standing outside in the cold, awaiting the train on which she should continue her journey, was not guilty of contributory negligence, and could recover for the injuries sustained in waiting to change cars.<sup>51</sup> A passenger attempting to alight from a moving train, when he knows it is dangerous, is guilty of such negligence as will preclude recovery for injuries received, though he may have been told by the conductor to get

47. *Hunter v. Cooperstown, etc.*, R. Co., 112 N. Y. 371, 8 Am. St. Rep. 752; *Myers v. New York Cent. R. Co.*, 88 Hun (N. Y.), 619; *Distler v. Long Island R. Co.*, 78 Hun (N. Y.), 252, 28 N. Y. Supp. 865; *Whitlock v. Comer*, 57 Fed. 565; *Pittsburgh, etc., R. Co. v. Gray*, 28 Ind. App. 588, 64 N. E. 39; *East Tennessee, etc., R. Co. v. Hughes*, 92 Ga. 388; *Jeffersonville R. Co. v. Swift*, 26 Ind. 459; *Files v. Boston, etc., R. Co.*, 149 Mass. 204, 14 Am. St. Rep. 411; *Bardwell v. Mobile, etc., R. Co.*, 63

Miss. 574, 56 Am. Rep. 842; *New York, etc., R. Co. v. Ball*, 53 N. J. L. 283; *Kansas, etc., R. Co. v. Dorough*, 72 Tex. 108; *Worthington v. Central Vermont R. Co. (Vt.)*, 23 Atl. 590.

48. *Twiss v. Boston Elev. Ry. Co.*, 208 Mass. 108.

49. *Killmeyer v. Wheeling Traction Co. (W. Va.)*, 77 S. E. 908.

50. *Grunfelder v. Brooklyn Heights R. Co.*, 127 N. Y. Supp. 1085, 143 App. Div. 89.

51. *Gibson v. St. Louis, etc., Ry. Co. (Tex. Civ. App.)*, 135 S. W. 1121.

off;<sup>52</sup> but passengers are in many cases excused from the imputation of negligence where they obey the direction or advice of trainmen, whom the passenger may justly suppose, by reason of their experience, to be better able to judge whether a given act is dangerous than the passenger himself.<sup>53</sup> For example, where the company's agent requested decedent and other passengers to cross the tracks to the platform so as to take the train, his invitation was an implied assurance, upon which decedent could rely, that he could cross the tracks safely, and he would not be negligent unless the danger from the train's approach was so imminent that, as an ordinarily prudent person, he should have known the peril in crossing.<sup>54</sup> It is not negligence for a passenger to rely upon instructions of the conductor, unless leading to known perils which an ordinary prudent person would not encounter.<sup>55</sup>

A passenger on a freight train carrying his live stock, who, at the request of the conductor, alighted from the caboose to assist in the saving of property endangered by a wreck of a part of the train, was entitled to recover for injuries sustained in consequence of alighting from the caboose while in a dangerous position, as against the objection that he was a volunteer, as his act was that of a prudent and reasonable man, justified by the conditions surrounding him and the invitation of the conductor, acting within the scope of his authority.<sup>56</sup>

52. *Farley v. Norfolk & W. Ry. Co.*, 67 W. Va. 350, 67 S. E. 1116, a railroad company is not liable for the act of its conductor in negligently directing a passenger to jump from a moving train, when the danger was obvious to the passenger, and no force or threats were used.

53. *Owens v. Atlantic Coast Line R. Co.*, 152 N. C. 439, 67 S. E. 993.

54. *Dieckmann v. Chicago & N. W. Ry. Co.*, 145 Iowa, 250, 121 N. W. 676, rev'g judg. 105 N. W. 526, while a passenger's right to assume that the company's agent had announced an

approaching train in time to enable him to cross the tracks to the platform in safety, and that a safe access to the platform was provided, did not relieve him from exercising due care for his own safety, those considerations were material in determining whether the passenger exercised due care in crossing.

55. *Terre Haute Traet., etc., Co. v. Payne*, 45 Ind. App. 132, 89 N. E. 413.

56. *Austin v. St. Louis & S. F. R. Co.*, 149 Mo. App. 397, 130 S. W. 385. Defendant, who was transporting

Where a passenger is permitted to ride on the bumper of a crowded street car, he is not guilty of contributory negligence in so riding which will relieve the carrier of liability for his injury resulting from the negligent management of the car, and in so riding he does not assume the risk of such injury.<sup>57</sup> Where a person goes on a train at a station with the permission of the trainmen to locate his family in a sleeper, and as he starts to leave the car, while the train is moving, the brakeman tells him to hurry up, and he is thrown under the moving car and is injured, he is guilty of contributory negligence.<sup>58</sup> A conductor of a freight train does not, by virtue of his employment, have authority, either real or apparent, to permit passengers upon a train to ride upon the engine under any ordinary circumstances.<sup>59</sup> A company operating a railroad for logging and other private purposes, which did not solicit passenger traffic, had no passenger cars or train schedule, and whose conductors were expressly instructed not to allow passengers to ride elsewhere than in the caboose, owed no duty to provide for the safety of a person riding in disobedience of such instruction, and was not liable for injuries to a person contracting with one of its conductors to be carried in a caboose to his destination, who

live stock for plaintiff, agreed to carry him in charge of the stock on the train where it was carried. When in the car with the stock, while it was being switched to be put into the train, he was injured by its being bumped. There was evidence that after the accident the conductor asked plaintiff if he was all right, and could go ahead with the car, and that, on giving an affirmative reply, he was allowed, without protest, to ride in the car to destination; also that a brakeman just before switching knew that plaintiff was in the car, and asked if everything was all right, stating that they were about to hitch on. It was held that, while no ex-

press contract entitling plaintiff to ride in the car with the stock, instead of in the passenger car on the train, was shown, it might be found that such was the contract, or that the conduct of defendant's employes was such as to justify plaintiff in inferring that he was rightly in the car, so as to entitle him to recover. *Leasum v. Green Bay & W. R. Co.*, 133 Wis. 593, 120 N. W. 510.

57. *Beaumont Traction Co. v. Happ* (Tex. Civ. App.), 122 S. W. 610.

58. *Purvis v. Buffalo, etc., R. Co.*, 219 Pa. 195, 68 Atl. 189.

59. *Illinois Cent. R. Co. v. Jennings*, 229 Ill. 608, 82 N. E. 403.

was subsequently directed by such conductor to finish his journey upon a flat car.<sup>60</sup>

#### § 4. Sudden peril.—Acts in emergencies.

There is no rule of law which imposes it as a duty upon one, over whom danger impends by the negligence of another, to incur greater danger by delaying his efforts to avoid it until its exact nature and measure are ascertained. The instinctive effort of a passenger, or his impulsive or unguarded act, resulting in injury, while trying to avoid danger, in a reasonable and well grounded fear that a collision was about to take place, or an accident occur, which would result in serious injury, due to the mismanagement of the carrier, or the fact that he did not exercise the best judgment in the emergency, does not relieve the carrier from responsibility; but is to be deemed a consequence of such mismanagement for which the carrier is responsible, and a presumption of negligence on the part of the carrier arises because of the injuries received.<sup>61</sup> The general rule is that a person placed by the reckless or careless acts of the servants or agents of another, in such a position as to be compelled to choose upon the instant and in the face of a great and impending peril between two hazards, such as a dangerous leap from the moving car, or to remain in the car at an apparently certain

60. *Boisen v. Cobbs & Mitchell*, 147 Mich. 429, 13 Detroit Leg. N. 1147, 111 N. W. 82.

61. *Voak v. Northern Cent. R. Co.*, 75 N. Y. 320; *Coulter v. American, etc., Express Co.*, 56 N. Y. 585; *Heath v. Glens Falls, etc., St. Ry. Co.*, 90 Hun (N. Y.), 560, 71 St. Rep. (N. Y.) 29, 36 N. Y. Supp. 22; *Buel v. New York Cent. R. Co.*, 31 N. Y. 314; *Chicago, etc., R. Co. v. Becker*, 76 Ill. 25; *Palmer v. Warren St. Ry. Co.*, 206 Pa. St. 574, 56 Atl. 49; *Gannon v. New York, etc., R. Co.*, 173 Mass. 50, 52 N. E. 1075, 43 L. R. A. 833, 5 Am. Neg. Rep. 613;

*Floutroup v. Boston & M. R. Co.*, 163 Mass. 152, 39 N. E. 797; *Dallas Consol. Tract. Ry. Co. v. Randolph* (Tex. Civ. App.), 27 S. W. 925, 5 Am. Electl. Cas. 379; *Adams v. Hannibal, etc., R. Co.*, 71 Mo. 553; *Pennsylvania R. Co. v. Stageneier*, 118 Ind. 305, 20 N. E. 843; *Chicago, etc., R. Co. v. Clough*, 134 Ill. 586, 25 N. E. 564; *Knowlton v. Milwaukee City Ry. Co.*, 59 Wis. 278; *Holzab v. New Orleans, etc., R. Co.*, 38 La. Ann. 185; *Duiney v. Wheeling, etc., R. Co.*, 28 Wis. 32; *South Covington, etc., Ry. Co. v. Ware*, 84 Ky. 267, 1 S. W. 493.

peril, is not precluded from recovery against the carrier for injuries thereby sustained, because of the fact that the car passed in safety and the peril was averted, where the action of the passenger was such as would have been taken by any one of ordinary prudence, placed in the same situation, and was not the result of unreasonable alarm and the injury was the result of such enforced action, and the proximate cause of the injury the misconduct of the person in charge of the car. The peril of remaining in the car is to be judged by the circumstances as they then appeared to the passenger, and not by the result, and the passenger has the right to act upon the probabilities as they appeared at the time. It is for the jury to say whether any one of ordinary prudence placed in the same situation would have acted in the same manner, and the outcries of the passengers in the same peril are competent upon the question as to whether the alarm of the person injured was unreasonable.<sup>62</sup> Ordinarily, a passenger who jumps from a train,

**62.** *N. Y.*—*Twomley v. Central Park, etc., R. Co.*, 69 *N. Y.* 158, 25 *Am. Rep.* 162; *Dyer v. Erie R. Co.*, 71 *N. Y.* 236; *Cuyler v. Decker*, 20 *Hun (N. Y.)*, 175; *Buel v. New York Cent. R. Co.*, 31 *N. Y.* 314, 88 *Am. Dec.* 271.

*U. S.*—*Ladd v. Foster*, 12 *Sawy. (U. S.)* 547; *Saltonstall v. Stockton Tancay (U. S.)*, 11; *Hastings v. Northern Pac. R. Co.*, 53 *Fed.* 224.

*Ala.*—*Selma St., etc., R. Co. v. Owen*, 132 *Ala.* 420, 31 *So.* 598; *Central R., etc., Co. v. Miles*, 88 *Ala.* 256.

*Ark.*—*St. Louis, etc., R. Co. v. Maddy*, 57 *Ark.* 306, 58 *Am. & Eng. R. Cas.* 327; *St. Louis, etc. R. Co. v. Murray*, 55 *Ark.* 248, 29 *Am. St. Rep.* 32, 52 *Am. & Eng. R. Cas.* 373.

*Cal.*—*Mitchell v. Southern Pac. R. Co.*, 87 *Cal.* 62.

*Colo.*—*Denver, etc., R. Co. v. Pickard*, 8 *Colo.* 163.

*Ga.*—*South Western R. Co. v. Paulk*, 24 *Ga.* 366.

*Ill.*—*West Chicago St. R. Co. v. Lyons*, 57 *Ill. App.* 536; *Galena, etc., R. Co. v. Yarwood*, 17 *Ill.* 509, 65 *Am. Dec.* 682; *Frink v. Potter*, 17 *Ill.* 406.

*Ind.*—*Grand Rapids, etc., R. Co. v. Ellison*, 117 *Ind.* 234, 39 *Am. & Eng. R. Cas.* 480; *Indiana Ry. Co. v. Maurer (Ind.)*, 66 *N. E.* 156.

*La.*—*Odom v. St. Louis, etc., R. Co.*, 45 *La. Ann.* 1201, 14 *So.* 734, 23 *L. R. A.* 152; *Carruth v. Texas, etc., R. Co.*, 45 *La. Ann.* 1228, 14 *So.* 736; *Reary v. Louisville, etc., R. Co.*, 40 *La. Ann.* 32.

*Md.*—*Western Maryland R. Co. v. State*, 95 *Md.* 637, 53 *Atl.* 969; *Western Maryland R. Co. v. Herold*, 74 *Md.* 510.

though in rapid motion, to avoid a threatened forcible ejection by the conductor, is not guilty of contributory negligence.<sup>63</sup> In the use of electrical appliances, the carrier is bound to use the very highest degree of care to see that those in use on the car do not get out of order and so endanger the safety of passengers.<sup>64</sup>

*Mass.*—Ingalls v. Bills, 9 Mete. (Mass.) 1, 43 Am. Dec. 346.

*Mich.*—Lacas v. Detroit City R. Co., 92 Mich. 412, 52 N. W. 745.

*Minn.*—Wilson v. Northern Pac. R. Co., 26 Minn. 278.

*Mo.*—Dimmitt v. Hannibal, etc., R. Co., 40 Mo. App. 654; Siegrist v. Arnot, 86 Mo. 200, 56 Am. Rep. 425.

*Ohio.*—Iron R. Co. v. Mowery, 36 Ohio St. 418, 38 Am. Rep. 597.

*Pa.*—Dunlay v. Traction Co., 18 Pa. Super. Ct. 206; Pennsylvania R. Co. v. Lyons, 129 Pa. St. 120, 15 Am. St. Rep. 701; Pennsylvania R. Co. v. Peters, 116 Pa. St. 206; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147, 62 Am. Dec. 323. If the passenger leaps from the car without reasonable apprehension of danger he is guilty of contributory negligence, but whether the circumstances were such as to afford reasonable grounds to apprehend danger has been held to be a question for the jury. See cases cited above in this note.

*W. Va.*—Mannon v. Camden Interstate Ry. Co., 3 St. Ry. Rep. 928, 56 W. Va. 554, 49 S. E. 450. See also, notes on Acts in Emergencies and cases cited 3 St. Ry. Rep. 928-932.

63. Kline v. Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 232; Highland Ave., etc., R. Co. v. Winn, 93 Ala. 309; International, etc., R. Co. v. Hassell, 62 Tex. 256; Boggess v. Chesapeake, etc., R. Co., 37 W. Va.

297. But he must have reasonable grounds for believing that he would suffer bodily harm by remaining on the train. St. Louis, etc., R. Co. v. Rosenberry, 45 Ark. 256, affd. (Ark.) 11 S. W. 212.

64. Leonard v. Brooklyn H. R. Co., 7 Am. Electl. Cas. 583, 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. 985, an action for injuries received by a woman in jumping from an electric car, where it appeared by the evidence that the entire car was enveloped in flames caused by defective insulation of the cables underneath. It was also held that the question whether the accident was caused by defective insulation, and whether the company used due care in its inspection, was for the jury. Poulson v. Nassau Elect. R. Co., 7 Am. Electl. Cas. 675, 18 App. Div. (N. Y.) 221, 45 N. Y. Supp. 941, where plaintiff's ten-year-old daughter jumped from an electric car because of a blaze of fire coming from alongside of the motorman, which blaze was so great that it was noticed 50 or 60 feet away, it was sufficient to authorize the jury to infer negligence on the part of the company. Poulson v. Nassau Elec. R. Co., 7 Am. Electl. Cas. 677, 30 App. Div. (N. Y.) 246, 51 N. Y. Supp. 933, and the fact that other passengers remained in the car would not operate conclusively to establish contributory negligence on plaintiff's part in

Where, by reason of the electric current being suddenly reversed to prevent a collision, the circuit breaker blew out, causing a loud explosion and a flash of light in the car, which was followed by the crash of breaking glass from the collision, the fact that the plaintiff, a nervous woman, was injured by jumping from the car, while the other passengers remained in the car and were uninjured, did not preclude her from the right to recover for her injuries.<sup>65</sup> So, a passenger, attempting to board a street car which starts after she has her foot upon the step and her hand upon the railing, is not necessarily negligent in continuing her hold upon the car after it starts, since, being placed in sudden peril by the negligence of the carrier, she is not held to strict accountability for her mode of action.<sup>66</sup> But there must be a reasonable apprehension of danger, and the carrier is not liable for an injury to a passenger occasioned by her jumping from the car under an apprehension of danger where there was no real danger and the apparent danger was not caused by the negligence of the carrier.<sup>67</sup> An act of the passenger to avoid great inconvenience, as shutting a car door to shut out smoke and cinders, although attended with slight danger, is not an act of contributory negli-

jumping. *Buckbee v. Third Ave. R. Co.*, 7 Am. Elecl. Cas. 692, 64 App. Div. (N. Y.) 360, 72 N. Y. Supp. 217, where plaintiff, a woman, in escaping from a car stepped on the door sill and claimed to have received an electric shock, flames having broken from the controller box and extended beneath the car for its entire length, being preceded by a loud report, the evidence was held sufficient to go to the jury on the question as to whether plaintiff's injury arose from a shock of electricity.

<sup>65</sup> *Wanzer v. Chippewa Val. El. R. Co.*, 108 Wis. 329, 84 N. W. 423. And see *Texarkana St. R. Co. v. Hart* (Tex. Civ. App.), 26 S. W. 435. So,

a passenger on a stalled electric car is not negligent, as a matter of law, in attempting to jump from a car on suddenly noticing that there is danger of another car colliding with it. *Quinn v. Shamokin & M. C. Elec. R. Co.*, 7 Pa. Super. Ct. 19; *Shankensbury v. Metropolitan St. R. Co.*, 46 Fed. 177.

<sup>66</sup> *Joilet St. Ry. Co. v. Duggan*, 45 Ill. App. 450. And see *Washington & G. R. Co. v. Hickey* (D. C.), 23 Wash. L. Rep. 177.

<sup>67</sup> *Kleiber v. Peoples R. Co.*, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613. And see *Getman v. Delaware, etc., R. Co.*, 162 N. Y. 21; *Chicago, etc., R. Co. v. Felton*, 125 Ill. 458.

gence;<sup>68</sup> but it has been held to the contrary where the act was attended with obviously great danger.<sup>69</sup>

A carrier may not negligently place a passenger in a situation where the passenger is bound to choose between two courses at her peril, and then interpose the defense that the act of the passenger was the intervening cause of the injury.<sup>70</sup> A passenger placed suddenly in a position of danger is not required to exercise infallible judgment, but only ordinary care.<sup>71</sup> Where defendant carrier wrongfully and negligently placed plaintiff in a perilous position by shutting the vestibule door, so that he could not return to the coach, and plaintiff, under the influence of sudden fright by reason thereof, jumped from the train, and was injured, defendant could not defeat recovery for the injuries sustained, on the theory that plaintiff was negligent.<sup>72</sup> An act done by a railroad passenger in the face of impending peril, caused by the company's negligence, in order to avoid injury, is not contributory negligence as a matter of law, though it in fact contributes to the injury; the rule being the same as in case of negligence accidents generally, where the peril of the injured person is created by another's fault and the injured person is rightfully where he is.<sup>73</sup> But where plaintiff, while the train is in motion, in order to avoid a collision which he apprehends, but of which there is no danger, jumps from the train and is injured, he cannot recover damages therefor.<sup>74</sup> That a passenger in a wagonette, injured in getting out while the horses were running away, with one line broken, would not have been injured had he retained his seat, will not prevent recovery, if getting out was the act of an ordinarily prudent and

68. *Western Maryland R. Co. v. Stanley*, 61 Md. 266, 48 Am. Rep. 96.

69. *Adams v. Lancashire, etc., R. Co.*, L. R. 4 C. P. 739; *Gee v. Metropolitan R. Co.*, L. R. 8 Q. B. 161.

70. *Smith v. Chicago City Ry. Co.*, 169 Ill. App. 570.

71. *Fulghum v. Atlantic Coast Line*

*R. Co.*, 158 N. C. 555, 74 S. E. 584.

72. *Texas & P. Ry. Co. v. Boyd* (Tex. Civ. App.), 141 S. W. 1076.

73. *Garrett v. Wabash R. Co.*, 159 Mo. App. 63, 139 S. W. 252.

74. *Marsalis v. Louisiana & N. W. R. Co.*, 129 La. 146, 55 So. 744.



careful man in the same situation and circumstances.<sup>75</sup> Where a carrier's negligence in starting a car places an alighting woman passenger in a position of danger, it cannot complain of her contributory negligence on the ground of her error of judgment in the emergency in retaining hold of a child accompanying her, who was upon the car, instead of letting go of the child, and taking hold of the car.<sup>76</sup> Where a female passenger reasonably anticipated injury from an explosion in an electric car, accompanied by a slight outburst of flame, she was not chargeable with contributory negligence in unnecessarily attempting to escape the danger, though it appears that, if she had remained in her seat, all danger would have been avoided.<sup>77</sup>

One compelled to act suddenly in the face of imminent peril need not exercise the care required if he had time to deliberate, especially where the peril is caused by another's fault; so that, if a street car passenger acted like a person of ordinary prudence in jumping from a car, which was beyond the motorman's control, in order to avoid a collision which he believed was imminent, the company would be liable for resulting injuries, if the danger from which the passenger sought to escape was caused by its negligence.<sup>78</sup> That plaintiff did not exercise the best judgment in re-

75. *White v. Brickley*, 156 Mo. App. 278, 137 S. W. 627.

76. *Montgomery v. Colorado Springs & I. Ry. Co.*, 50 Colo. 210, 114 Pac. 659. In the sudden and unexpected starting of a street car while a passenger is attempting to board, there is presented an emergency; an "emergency" being a sudden and unexpected happening or occasion calling for immediate action. *Burger v. Omaha, etc., St. Ry. Co.*, 139 Iowa, 645, 117 N. W. 35.

77. *Steverman v. Boston Elev. Ry. Co.*, 205 Mass. 508, 91 N. E. 919.

78. *Eaton v. Wilmington City Ry.*

*Co.*, 1 Boyce (24 Del.), 435, 75 Atl. 369.

Where plaintiff, a woman 69 years of age, was injured while riding on defendant's street car by a collision between the car and an ice wagon approaching each other at right angles at a crossing: plaintiff saw the wagon and the danger of collision just before it occurred, when she got up and stepped to the other side of the car as she saw other passengers doing; and, when the collision occurred, she was thrown forward onto the back of a seat, and the tongue of the wagon, entering the car, dragged down over

sisting an assault by the conductor of a street car did not of itself show contributory negligence.<sup>79</sup> A passenger, whether on a steam railroad, a street railroad, or an interurban railroad, leaving his seat to escape an apparent danger occasioned by the explosion of the controllers, is not negligent.<sup>80</sup> Where a street car is running rapidly down a dangerous grade, a passenger has the right, in view of imminent danger, to jump from the car to avoid injury.<sup>81</sup> It is not contributory negligence for a passenger in a stagecoach to jump out when it begins to tip over.<sup>82</sup> Where a woman was induced to alight by the negligence of a street car company, at night, at a strange place, remote from her destination, in a storm, she was under no legal duty to apply for shelter at houses in the vicinity of the place rather than attempt to reach her destination on foot over a highway which was in a reasonably safe condition.<sup>83</sup> Where a passenger, seeing a collision was imminent, jumped from the mov-

her back and hip, it was held that plaintiff's act in moving from her position was done in an emergency not of her creation, and the fact that she made an unwise choice of means to escape did not constitute contributory negligence. *South Covington & C. St. Ry. Co. v. Crutcher*, 135 Ky. 698, 123 S. W. 268.

79. *Braly v. Fresno City Ry. Co.*, 9 Cal. App. 417, 99 Pac. 400.

80. *Louisville & S. I. Traction Co. v. Worrell*, 44 Ind. App. 480, 86 N. E. 78.

Where there was evidence that a passenger, moved by the impulse of fear caused by the explosion of the controllers, carefully stepped off the car and was thrown to the ground and injured, the jury properly found that the passenger, in attempting to get away from the danger, was not negligent. *Id.*

An action will lie against a street

railroad company for injury caused plaintiff in leaping from a car in which an electrical explosion had occurred, flames issuing in the part of the car where she was, where such explosions were of frequent occurrence and tended to excite and frighten passengers, though there was no evidence that other passengers had been excited or frightened; it being common knowledge that such explosions would tend to frighten passengers situated as she was, and it appearing that the motorman leaped from the car before plaintiff did. *Williamson v. St. Louis Transit Co.*, 202 Mo. 345, 100 S. W. 1072.

81. *Lehner v. Pittsburg Rys. Co.*, 223 Pa. 208, 72 Atl. 525.

82. *Dinnigan v. Peterson*, 3 Cal. App. 764, 87 Pac. 218.

83. *Georgia Ry., etc., Co. v. McAllister*, 126 Ga. 47, 5 S. E. 957, 7 L. R. A. (N. S.) 1177.

ing train and was injured, she could recover, though she might not have been hurt had she remained in the coach, being entitled to act on a natural impulse which an ordinary prudent person situated and conditioned as she was would reasonably have been expected to do.<sup>84</sup>

## § 5. Contributory negligence of children.

It is a rule of law now almost universally held that the degree of care, prudence and discretion required from children, who are *sui juris*, is not the same as is required of adults, but is only such as ought reasonably to be expected of persons of their age, intelligence, capacity and experience.<sup>85</sup> The courts have held, as a general rule, that children under five years of age are *non sui juris*, and cannot be guilty of contributory negligence, as a matter of law.<sup>86</sup> It

84. *Big Sandy & C. R. Co. v. Blankenship*, 133 Ky. 438, 118 S. W. 315.

85. *Swift v. Staten Island R. Co.*, 123 N. Y. 650; *McCarragher v. Rogers*, 120 N. Y. 535; *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 107; *Kuebler v. New York, etc., R. Co.*, 15 N. Y. Supp. 187; *Byrne v. New York Cent., etc., R. Co.*, 83 N. Y. 620; *Hayeroft v. Lake Shore, etc., R. Co.*, 2 Hun (N. Y.), 491, 64 N. Y. 636; *Casey v. New York Cent., etc., R. Co.*, 78 N. Y. 518; *McGovern v. New York Cent., etc., R. Co.*, 67 N. Y. 417; *Fallon v. Central Park, etc., R. Co.*, 64 N. Y. 13; *Thurber v. Harlem, etc., R. Co.*, 60 N. Y. 336; *Reynolds v. New York Cent., etc., R. Co.*, 58 N. Y. 252; *Mowrey v. Central City R. Co.*, 51 N. Y. 666; *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445; *Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 42; *Mallard v. Ninth Ave. R. Co.*, 27 St. Rep. (N. Y.) 801. 7 N. Y. Supp. 666; *Block v. Harlem, etc., R. Co.*, 28 St. Rep. (N. Y.) 495,

9 N. Y. Supp. 164; *Western, etc., R. Co. v. Young*, 83 N. Y. 512; *Hemingway v. Chicago, etc., R. Co.*, 72 Wis. 42, 7 Am. St. Rep. 823; *Chicago, etc., R. Co. v. Wileox*, 44 Alb. L. J. 70; *Wright v. Detroit, etc., R. Co.*, 77 Mich. 123; *Citizens' St. R. Co. v. Hamer* (Ind. App.), 62 N. E. 778; *Philadelphia, etc., R. Co. v. Hassard*, 75 Pa. St. 367; *Coller v. Frankford, etc., R. Co. (Pa.)*, 9 W. N. C. 477; *Ridenhour v. Kansas, etc., R. Co.*, 102 Mo. 270; *Chicago City R. Co. v. Wileox* (Ill.), 24 N. E. 419; *Erie City, etc., R. Co. v. Schuester*, 113 Pa. St. 413; *Louisville R. Co. v. Phillips*, 22 Ky. Law. Rep. 842, 58 S. W. 995.

86. *Ihl v. Forty-Second St., etc., R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450; *Neum v. Rochester Ry. Co.*, 165 N. Y. 146, 58 N. E. 876; *Prendergast v. New York Cent., etc., R. Co.*, 58 N. Y. 652; *Frick v. St. Louis, etc., R. Co.*, 23 Wis. 186; *Wright v. Malden, etc., R. Co.*, 4 Allen (Mass.), 283;

has been quite generally held also that infants over twelve years of age are presumed, as a matter of law, to be *sui juris* as to their responsibility for contributory negligence, and to have sufficient capacity to apprehend, and sufficient prudence and foresight to avoid danger, and this presumption prevails in the absence of any evidence showing the lack of such capacity.<sup>87</sup> As to children under those ages, the courts have usually held the question whether the child was *sui juris* to be one of fact for the jury to determine, and not a question of law, unless the child was unusually intelligent, or the situation was such that a child of ordinary intelligence must of necessity realize his danger.<sup>88</sup> The rule adopted by the New York courts in the earlier cases holding an infant to the same degree of care as an adult was subsequently repudiated by the Court of Appeals of that State, which adopted the rule now generally held as above stated.<sup>89</sup> In entering, riding upon, and leaving

Toledo, etc., R. Co. v. Grable, 88 Ill. 441; Farris v. Cass Ave., etc., R. Co., 80 Mo. 325; Baltimore City P. R. Co. v. McDonnell, 43 Md. 534; Giraldo v. Coney Island, etc., R. Co., 16 N. Y. Supp. 774; Mangam v. Brooklyn R. Co., 38 N. Y. 455, 36 Barb. (N. Y.) 130; Pittsburgh, etc., R. Co. v. Caldwell, 74 Pa. St. 421; Westerfield v. Lewis, 43 La. Ann. 63, 9 So. Rep. 52; Government St. R. Co. v. Hanlon, 53 Ala. 570.

87. Tucker v. New York Cent., etc., R. Co., 124 N. Y. 308, 26 N. E. 916; Manahan v. Steinway, etc., R. Co., 125 N. Y. 760; St. Clair St. Ry. Co. v. Eadie, 43 Ohio St. 91, 54 Am. Rep. 144; Nagle v. Alleghany Val. R. Co., 88 Pa. St. 35; Hogan v. Central Park, etc., R. Co., 124 N. Y. 647.

88. Stone v. Dry Dock, etc., R. Co., 115 N. Y. 104, 23 N. Y. St. Rep. 551, rev'g. 46 Hun (N. Y.), 184; Gumby v. Metropolitan St. Ry. Co., 171 N. Y.

635, 65 App. Div. (N. Y.) 38, 72 N. Y. Supp. 551; Weitzman v. Nassau Electric R. Co., 33 App. Div. (N. Y.) 585, 53 N. Y. Supp. 905; Sullivan v. Union Ry. Co., 81 App. Div. (N. Y.) 596, 81 N. Y. Supp. 449; McDermott v. Boston Elev. Ry. Co., 1 St. Ry. Rep. 325 (Mass.), 68 N. E. 34; Costello v. Third Ave. R. Co., 161 N. Y. 317, 55 N. E. 897; Dowling v. New York Cent., etc., R. Co., 90 N. Y. 671; Moebus v. Herrman, 108 N. Y. 353; Tucker v. New York Cent., etc., R. Co., 124 N. Y. 308, 33 N. Y. St. Rep. 273; Zwaack v. New York Cent., etc., R. Co., 160 N. Y. 362, 54 N. E. 785.

89. Thurber v. Harlem, etc., R. Co., 60 N. Y. 326, repudiating former rule laid down in Honegsberger v. Second Ave. R. Co., 2 Abb. Ct. App. Dec. 378, 1 Keyes (N. Y.), 574; Burke v. Seventh Ave., etc., R. Co., 49 Barb. (N. Y.) 529; Solomon v. Central Park,

trains or street cars, children who are *sui juris* are bound to exercise prudence equal to their capacity, knowledge, and experience, and to that extent are held responsible in law for acts or omissions contributory to their own injury.<sup>90</sup> A boy fourteen years old is not, as matter of law, free from contributory negligence in trying to board an electric car followed by a trailer moving at the rate of from three to seven miles an hour.<sup>91</sup> If a boy ten years old fall from the platform or car steps because of his own imprudence, the carrier is not liable merely because the conductor called him to the platform when about to reach his destination and while giving the signal to stop.<sup>92</sup> Nor is the carrier liable for the death of a seven year old boy caused by his falling from a car in which he was riding without permission while voluntarily attempting to alight while the car was moving.<sup>93</sup> But where a young girl is boarding a street car and has hold of the hand rail when it starts, it is not contributory negligence for her to hold on to the rail, even though it causes her to be dragged half a block.<sup>94</sup> Where a boy sixteen years of age, a passenger on defendant's street car, the rear platform being too crowded to allow him to get on, got on the front platform, which was also crowded, standing with one foot on the platform and the other on the step, holding to the dashboard rail; the conductor ran forward to get on

etc., R. Co., 1 Sweeny (N. Y.), 298; and Squire v. Central Park, etc., R. Co., 36 N. Y. Super. Ct. 432; Swift v. Staten Island R. T. Co., 123 N. Y. 645, 33 St. Rep. 604. See also, Phillips v. Duquesne Tract. Co., 8 Pa. Super. Ct. 210, 42 W. N. C. 528, 29 Pittsb. L. J. N. S. 60.

90. Little Rock Tract. & E. Co. v. Nelson, 66 Ark. 494, 52 S. W. 7; Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 534; Phila. City Pass. Ry. Co. v. Hassard, 75 Pa. St. 367.

91. Sly v. Union Depot R. Co., 134

Mo. 681, 36 S. W. 235; Chicago City Ry. Co. v. Wilcox (Ill.), 24 N. E. 419, 8 L. R. A. 494; Erie City Pass. Ry. Co. v. Schuester, 113 Pa. St. 412, 6 Atl. 269; Mowrey v. Central City Ry. Co., 66 Barb. (N. Y.) 43; Swift v. Staten Island R. T. Co., 123 N. Y. 645, 25 N. E. 378.

92. Cronan v. Crescent City R. Co., 49 Ia. Ann. 65, 21 So. 163.

93. Brightman v. Union St. R. Co., 167 Mass. 113, 44 N. E. 1091.

94. Schoenfelt v. Metropolitan St. Ry. Co., 40 Misc. Rep. (N. Y.) 201, 81 N. Y. Supp. 644.

the front platform and at the first attempt failed, and on the second attempt, calling out for the passengers to make room for him, hit against plaintiff, and he and the conductor were immediately forced off, and he was run over; the question of negligence and contributory negligence were held to be properly submitted to the jury.<sup>95</sup> So, whether it was contributory negligence for a boy thirteen years of age, to sit on the platform of an electric car, resting his feet on the lower step, was held to be a question for the jury, since, the defendant was not attempting to prevent passengers riding upon the steps and having accepted the plaintiff as a passenger while occupying the position he did, the question of negligence was at least one concerning which reasonable minds might differ.<sup>96</sup> A railroad company owes the duty of preventing children of such tender years that negligence cannot be imputed to them from being on the platform of a moving car, and, if such a child gets there without permission, failure to remove it from its position of danger as soon as it is discovered, is negligence.<sup>97</sup> Parents are not guilty of contributory negligence *per se* in permitting a boy of ten years, bright and healthy, to go upon an errand two miles away and return by a train which he knew would be signaled to stop near his home, and would stop when signaled, which will prevent a recovery by them for injuries sustained by the boy in jumping off the train upon the conductor's refusal to stop.<sup>98</sup> How much experience and what degree of intelligence a child must evince before negligence can be imputed to him can never be determined as a matter of law. The age, the person, the circumstances surrounding the accident must all be taken into con-

95. *Gray v. Metropolitan St. Ry. Co.*, 39 App. Div. (N. Y.) 536, 57 N. Y. Supp. (91 St. Rep.) 587; *Garoni v. Compagne Nationale de Navigation*, 131 N. Y. 614, affg. 39 St. Rep. (N. Y.) 63, 14 N. Y. Supp. 797.

96. *Seller v. Market St. Ry. Co.*, 1 St. Ry. Rep. 9, 139 Cal. 268, 72 Pac. 1006.

97. *Levin v. Second Ave. Tract. Co.*, 201 Pa. 58, 50 Atl. 225; *Barre v. Railway Co.*, 155 Pa. 170, 26 Atl. 99.

98. *Avery v. Galveston, etc., R. Co.*, 81 Tex. 243, 26 Am. St. Rep. 809, 16 S. W. 1015.

sideration and the jury determines the question as a matter of fact.<sup>99</sup>

A carrier is not liable for the death of a child who was traveling with his mother, and who was temporarily left by her in the seat of the coach, and who in disobedience of her instructions passed through the door of the coach which had been left open (the weather being hot) and went upon the platform and fell from the train.<sup>1</sup> Whether a boy fourteen years old was at fault in jumping from a moving train depended on whether the ordinary boy of his age and experience and with his knowledge of the situation and its dangers would have done what he did.<sup>2</sup>

### § 6. Contributory negligence of aged or infirm persons.

A carrier does not owe to every passenger precisely the same care without respect to age, or bodily infirmity.<sup>3</sup> If a passenger be evidently crippled, or infirm, or very young, the duty of the carrier toward him while boarding the car or alighting, or while remaining in the car, must be performed with due regard to such apparent condition.<sup>4</sup> A passenger has a right to rely on the car-

99. *Barksdull v. New Orleans & C. R. Co.*, 23 La. Ann. 180; *McMahon v. Northern Cent. Ry. Co.*, 39 Md. 438; *Hestonville Pass. Ry. Co. v. Connell*, 88 Pa. St. 520; *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310, affg. 3 E. D. Smith, 103; *Washington & G. Ry. Co. v. Gladmon*, 15 Wall. (U. S.) 401; *Brown v. European, etc., R. Co.*, 58 Me. 384; *Nagle v. Allegheny V. R. Co.*, 88 Pa. St. 35; *St. Claire St. Ry. Co. v. Eadie*, 43 Ohio St. 91, 54 Am. Rep. 144; *Westerfield v. Lewis*, 43 La. Ann. 63, 9 So. 52; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Farris v. Cass Ave., etc., R. Co.*, 80 Mo. 325. See other cases cited elsewhere as to contributory negligence of children and

their parents, guardians or custodians.

1. *Savage v. Illinois Cent. R. Co.*, 164 Ill. App. 634.

2. *Kambour v. Boston & M. R. R. (N. H.)*, 86 Atl. 624.

3. *St. Louis, etc., R. Co. v. Finlay*, 79 Tex. 85, 15 S. W. 626; *Schiller v. Dry Dock, etc., R. Co.*, 26 Misc. Rep. (N. Y.) 392, 56 N. Y. Supp. 184.

4. *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 283, 14 S. W. 760; *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39, 34 How. Pr. (N. Y.) 217; *Newark & So. R. Co. v. McCann*, 58 N. J. L. (29 Vroom.) 642, 34 Atl. 1052, 4 Am. & Eng. R. Cas. 382, 33 L. R. A. 127; *Indianapolis, etc., R. Co. v. Pitzer*, 109 Ind. 179; *East*

rier's exercising proper care and furnishing a reasonably safe place to board and alight, and the fact that he is old, crippled, deaf, or blind, or very young, and is traveling alone, without an attendant, does not as a matter of law, constitute contributory negligence.<sup>5</sup> But where a passenger is laboring under such a disability, he will be guilty of negligence if he does not make known his infirmity to the carrier's servants; and where a passenger alighting from a car did not ask for assistance, though having an opportunity, nor inform the servants in charge of his disability, nor look to see whether the place to alight was safe, he was negligent precluding recovery for an injury received.<sup>6</sup> Knowledge communicated to one employe upon a car that a passenger is feeble and will need assistance in getting off is notice to the carrier; and it is not necessary to notify the conductor or the one in charge of the car,<sup>7</sup> and a conversation which plaintiff had with the conductor on entering the car is competent to show that he

Line & R. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834; Shenandoah Val. R. Co. v. Moose, 83 Va. 827, 3 S. E. 796; Lake Shore, etc., R. Co. v. Salzman, 52 Ohio St. 558, 31 L. R. A. 261; Atchison, etc., R. Co. v. Weber, 33 Kan. 543; Louisville, etc., R. Co. v. Fleming, 14 Lea. (Tenn.) 128; Columbus, etc., R. Co. v. Powell, 40 Ind. 37.

5. Texas & P. Ry. Co. v. Reid (Tex. Civ. App.), 74 S. W. 99; St. Louis S. W. Ry. Co. v. Ferguson (Tex. Civ. App.), 64 S. W. 797. See also, Sheridan v. Brooklyn City, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490; St. Louis, etc., R. Co. v. Maddry, 57 Ark. 306. But see New Orleans, etc., R. Co. v. Statham, 42 Miss. 607, 92 Am. Dec. 478, holding it a duty for such person to have an attendant.

6. Young v. Missouri Pac. R. Co., 93 Mo. App. 267; Willetts v. Buffalo,

etc., R. Co., 14 Barb. (N. Y.) 585; New Orleans, etc., R. Co. v. Statham, *supra*; McGinney v. Canadian Pac. R. Co., 7 Manitoba L. Rep. 151.

7. Foss v. Boston & M. R. Co. (N. H.), 21 Atl. 222, 11 L. R. A. 367, 47 Am. & Eng. R. Cas. 566; Croom v. Chicago, etc., R. Co., 52 Minn. 296, 38 Am. St. Rep. 557, 53 N. W. 1128, 18 L. R. A. 602, 7 Am. Ry. & Corp. Rep. 468. The carrier is not liable for the death by heart disease of a passenger, who was rudely and roughly removed from the car by the driver under the mistaken impression that he was drunk, and placed on the sidewalk, where soon after he died, there being nothing to show that it was not the disease that killed him, or that the driver's wrongful acts in any manner produced or hastened his death. Briggs v. Minneapolis, 52 Minn. 36, 53 N. W. 1019.



knew that the plaintiff was a cripple.<sup>8</sup> Where an elderly man requested a street car driver to stop and permit him to alight and was rudely answered, he cannot recover if he be injured in attempting to jump from the car while in slow motion without any notice to the driver of his intention, although his injury was occasioned by a sudden jerk of the car as the team drawing it were struck by a whip just as he was alighting.<sup>9</sup> The carrier is not chargeable with notice that a passenger more than fifty years of age has ridden on a cable car only once or twice and does not understand the manner of receiving and discharging passengers.<sup>10</sup> But appearance alone is no excuse for a mistake on the part of the carrier's servant; thus, if he forcibly remove from the street car one suffering from St. Vitus dance, or one being in a weak condition from the administration of anaesthetics by a physician, under the mistaken notion that he is intoxicated, a rule of the company requiring conductors not to allow intoxicated persons on the car affords no protection.<sup>11</sup> Whether one is negligent, however crippled or otherwise disabled, in attempting to board a moving car is generally a question for the jury under the circumstances of the case.<sup>12</sup> A person who is laboring under the infirmities incident to old age, or who is crippled or otherwise physically disabled, is bound to exercise only such a degree of care and diligence to avoid danger as his physical and mental capacity enable him to exercise.<sup>13</sup> No one, whether sick, lame, imbecile, or vig-

8. Louisville, etc., R. Co. v. Bowlds, 23 Ky. L. Rep. 1212, 64 S. W. 957.

9. Outen v. North & S. St. R. Co., 94 Ga. 662, 21 S. E. 710.

10. Jackson v. Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192.

11. Regner v. Glens Falls, etc., R. Co., 74 Hun (N. Y.), 202, 56 St. Rep. (N. Y.) 300, 26 N. Y. Supp. 625; Watson v. Oswego St. Ry. Co., 7 Misc. Rep. (N. Y.) 356, 28 N. Y. Supp. 84.

12. Cincinnati, etc., R. Co. v. Nolan,

8 Ohio C. C. 347; Shaughnessy v. Consol. Tract. Co., 17 Pa. Super. Ct. 588; Baltimore Tract. Co. v. State, Ringgold, 78 Md. 409, 58 Am. & Eng. R. Cas. 200, 28 Atl. 397.

13. Mowrey v. Central City R. Co., 51 N. Y. 666; Chicago West D. Ry. Co. v. Haviland, 12 Ill. App. 561; Jacksonville St. Ry. Co. v. Chappell, 21 Fla. 175; Walter v. Chicago, etc., R. Co., 39 Iowa, 33; Bridges v. North London R. Co., L. R. 7 H. L. 213.

orous and youthful is bound to exercise all the skill and all the care that the most capable and ready-witted person could command. Ordinary capacity and ordinary care and attention in protecting themselves is all the law requires. This each is bound to give whatever his age or condition; and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence.<sup>14</sup>

The care to be observed by one who is blind, traveling alone on railroad trains, is greater than that required of one who is without such infirmity.<sup>15</sup> At a point in a city three different car lines intersected; these tracks forming a triangle in the street. A blind passenger upon the first line wished to transfer to the second. After being assured by the conductor of the car he left that the "road was clear," he proceeded to cross the triangle, and was struck by a car going in the opposite direction, but upon the line to which he wished to transfer. This car had already crossed the point of intersection with the third line, and struck the passenger just as he was leaving the triangle. The passenger was familiar with this locality, and made no particular effort to listen for the car which struck him. It was held that he was, as a matter of law, guilty of contributory negligence, and could not recover, despite the negligence of those in charge of the car which struck him.<sup>16</sup> An interurban railway cannot defeat a claim for damages in an action against it for negligence on the ground that the plaintiff was drawing a pension for total disability, and was traveling alone and unattended, if the plaintiff exercised such care as men in his condition of mind and body would ordinarily exercise under like circumstances.<sup>17</sup> One who carelessly sits down on an electric railway track to await a car at a station is not continuously negligent

14. *Sheridan v. Brooklyn City, etc., R. Co.*, 36 N. Y. 39, 93 Am. Dec. 490; *Farrar v. New Orleans, etc., R. Co.*, 52 La. Ann. 417, 26 So. 995.

15. *Deaver & R. G. R. Co. v. Derry*, 47 Colo. 584, 108 Pac. 172.

16. *Wilson v. Detroit United Ry.*, 167 Mich. 107, 18 Detroit Leg. N. 623, 132 N. W. 762.

17. *Toledo, etc., Traction Co. v. McFall*, 28 Ohio Cir. Ct. R. 362.

by reason of becoming unconscious from sleep or coma, and thereby unable to avoid a car wantonly run on him.<sup>18</sup>

### § 7. Contributory negligence of parents, guardians, or custodians.

The rule that the negligent conduct of a parent, guardian, or custodian in allowing a child *non sui juris* to be exposed to danger, which negligence is the proximate cause of injury, is contributory negligence which must be imputed to the child and will bar the plaintiff from recovery in an action brought for personal injuries has been applied in the case of an action for injuries to a passenger who was an infant, and where plaintiff's father took her under his arm, and stepped from a moving train after it had passed the platform at a station, fell, and she was injured, the plaintiff was held, as matter of law, chargeable with contributory negligence.<sup>19</sup> But it has been held not negligence *per se* for a mother to permit a child four years of age to ride on a street car in charge of another child twelve and one-half years old;<sup>20</sup> nor to permit a child of five to ride upon a street car in company with another child of eleven.<sup>21</sup>

### § 8. Intoxication as evidence of contributory negligence.

One who voluntarily disables himself by reason of intoxication is held to the same degree of care and prudence for his safety as is required of a sober person.<sup>22</sup> If intoxication contributes to an injury in any degree as a proximate cause thereof, it is a complete bar to any action for any damages sustained in consequence of it.<sup>23</sup>

18. *Tempfer v. Joplin & P. Ry. Co.* (Kan.), 131 Pac. 592.

19. *Morrison v. Erie R. Co.*, 56 N. Y. 304.

20. *East Saginaw City R. Co. v. Bohm*, 27 Mich. 503.

21. *Pittsburgh, etc., R. Co. v. Caldwell*, 74 Pa. St. 421.

22. *Smith v. Norfolk & S. R. Co.*, 114 N. C. 728, 19 S. E. 863, 923;

*Chicago City Ry. Co. v. Lewis*, 5 Ill. App. 242.

23. *Fisher v. West Virginia & P. R. Co.*, 19 S. E. (W. Va.) 578, 23 L. R. A. 758, 58 Am. & Eng. R. Cas. 337; *Holland v. West End St. R. Co.*, 29 N. E. (Mass.) 622; *Butler v. Steinway R. Co.*, 87 Hun (N. Y.), 10, 67 N. Y. St. Rep. 498, 33 N. Y. Supp. 845; *Monk v. Town of New*

It is not itself, as matter of law, such negligence as will bar a recovery however, unless such intoxication was in some way the cause of, or contributed to, the accident or injury.<sup>24</sup> The mere fact that a passenger at the time he was injured was intoxicated is not in itself evidence of contributory negligence, but it is a circumstance to be considered, and it is for the jury to determine whether it in fact contributed to his injury.<sup>25</sup> But the carrier is liable, notwithstanding such contributory negligence on the part of the plaintiff, when the conduct of the carrier was willful or its negligence occurred subsequent to that of the injured person.<sup>26</sup> The knowledge of the condition of one who has become helpless by intoxication, and is known to be in a position of danger, imposes upon the carrier the duty of exercising special care and diligence.<sup>27</sup>

Voluntary intoxication of a passenger does not bar a right to recover for personal injuries caused by the negligence of a carrier, nor does it relieve him from the duty of exercising care for his own safety.<sup>28</sup> Where a street railway passenger is injured by the

Utrecht, 104 N. Y. 552; *Welty v. Indianapolis, etc.*, R. Co., 105 Ind. 55; the testimony of a witness characterizing the acts of the plaintiff as those of an intoxicated person is competent evidence, *Donoho v. Metropolitan St. Ry. Co.*, 30 Misc. Rep. (N. Y.) 433, 62 N. Y. Supp. 523.

24. *Denver Tramway Co. v. Reid*, 35 Pac. (Colo. App.) 269; *Ward v. Chicago, etc.*, R. Co., 55 N. W. (Wis.) 771; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Holmes v. Oregon, etc.*, R. Co., 6 Sawy. (U. S.) 262.

25. *Trumbull v. Erickson*, 97 Fed. (Colo.) 891, 38 C. C. A. 536; what is sufficient evidence of the plaintiff's intoxication to go to the jury on the question of his own negligence as the cause of the accident, *Bradley v. Second Ave. R. Co.*, 8 Daly (N. Y.), 289.

See also, *Miliman v. New York Cent., etc.*, R. Co., 6 T. & C. (N. Y.) 585; *Strand v. Chicago, etc.*, R. Co., 67 Mich. 380; *Whalen v. St. Louis, etc.*, R. Co., 60 Mo. 323.

26. A common carrier owes a duty to a drunken passenger not to jerk its train while he is getting off at a station where it has stopped. *Milliman v. New York Cent., etc.*, R. Co., 66 N. Y. 642.

27. *Kean v. Baltimore, etc.*, R. Co., 61 Md. 154; *Seymour v. Town of Lake*, 66 Wis. 651; *Kramer v. New Orleans City & L. R. Co.*, 51 La. Ann. 1689, 26 So. 411.

28. *Wilcke v. Henrotin*, 241 Ill. 169, 89 N. E. 329. See generally on this subject "*Joyce on Intoxicating Liquors.*"

sudden starting of the car while he is attempting to alight, that he may have been intoxicated is no bar to a recovery; but his condition would only be a circumstance touching his knowledge as to whether the car had stopped before he attempted to alight.<sup>29</sup> A passenger's intoxication at the time he was injured by being thrown from the train was not material unless it contributed to the injury.<sup>30</sup> That a passenger alighting from a train is drunk does not *per se* constitute contributory negligence.<sup>31</sup> In an action against a street car company for wrongful death resulting from defendant's alleged negligence in setting down decedent from its train while intoxicated at an unsafe place, an instruction assuming that acts which would be negligence if committed by sober persons are also negligence when committed by an intoxicated one was erroneous.<sup>32</sup>

### § 9. Contributory negligence as a question of law or fact.

When the facts of a case are undisputed, the question of contributory negligence may become one of law, as the other questions which arise upon a trial and are submitted to the decision of the court on a motion for a nonsuit. Where the facts as to which there is and can be no dispute are of such character and weight that the court can determine that there is no room for doubt or query, but that there was a complete absence of that care and prudence, without which, in the direction of conduct, there is negligence, the court should determine the question, as a matter of law, with-

29. *Rangenier v. Seattle Electric Co.*, 52 Wash. 401, 100 Pac. 842.

30. *Midland Valley R. Co. v. Hamilton*, 84 Ark. 81, 104 S. W. 540.

In an action for injuries to a passenger while attempting to alight from a train, plaintiff's intoxication, if any, was not in itself contributory negligence which would constitute a defense, but was merely a circum-

stance to be considered in determining whether such intoxication contributed to the injury. *Kansas City S. Ry. Co. v. Davis*, 83 Ark. 217, 103 S. W. 603.

31. *Louisville & N. R. Co. v. Deason*, 29 Ky. Law Rep. 1259, 96 S. W. 1115.

32. *Sullivan v. Seattle Electric Co.*, 44 Wash. 53, 86 Pac. 786.

out calling in the aid of a jury.<sup>33</sup> But where the testimony is conflicting and any of the material facts of the case are disputed the question of contributory negligence is one for the jury;<sup>34</sup> as, for example, where there is a conflict of evidence as to whether or not a car or train was in motion while the passenger was in the act of boarding or alighting,<sup>35</sup> or as to whether or not the passenger jumped from a moving train.<sup>36</sup> So, where the facts are not disputed, but the circumstances and the conduct of the injured party are such that various inferences may be drawn therefrom, it is proper to submit the question of contributory negligence to the jury.<sup>37</sup>

#### § 10. Traveling in violation of statute not contributory negligence.

The duty imposed by law upon the carrier of passengers to carry safely so far as human skill and foresight can go, the persons it undertakes to carry, exists independently of contract, and although there is no contract in a legal sense between the parties. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in pro-

33. *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Burrows v. Erie R. Co.*, 63 N. Y. 560; *Phillips v. Rensselaer, etc.*, R. Co., 49 N. Y. 177; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131, 97 Am. Dec. 780; *Lucas v. New Bedford, etc., R. Co.*, 6 Gray (Mass.), 64, 66 Am. Dec. 406; *Mayo v. Boston, etc., R. Co.*, 104 Mass. 142; *Nagle v. California Southern R. Co.*, 88 Cal. 86; *Jackson v. Crilly*, 16 Colo. 103; *Raben v. Central Iowa R. Co.*, 74 Iowa, 735, Baltimore, etc., Turnpike Road Co. v. Leonhardt, 66 Md. 72.

34. *Jones v. Brooklyn, etc., R. Co.*, 21 St. Rep. (N. Y.) 169, 3 N. Y.

Supp. 253; *Armstrong v. New York Cent., etc., R. Co.*, 66 Barb. (N. Y.) 437; *Kelly v. Hannibal, etc., R. Co.*, 70 Mo. 604; *Enches v. New York, etc., R. Co.*, 135 Pa. St. 194; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571.

35. See cases cited in last preceding note.

36. *Legett v. Western New York, etc., R. Co.*, 143 Pa. St. 51.

37. *Hastings v. Northern Pac. R. Co.*, 53 Fed. 224; *McQuilken v. Central Pac. R. Co.*, 64 Cal. 463; *Central, etc., R. Co. v. Miles*, 88 Ala. 261; *Shannon v. Boston, etc., R. Co.*, 78 Me. 60; *Chaffee v. Boston, etc., R. Corp.*, 104 Mass. 115; *Gaynor v. Old Colony, etc., R. Co.*, 100 Mass. 212.

tecting those who have intrusted themselves to their hands. A breach of this duty is a breach of the law, and whether there is a contract to carry, or the service undertaken is gratuitous, an action lies against the carrier for this breach resulting in the negligent injury of a passenger. The liability of the carrier is the same, whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same, and when there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is co-extensive with the liability on the contract. Such a case, therefore, is not within the principle which forbids a recovery upon a contract made in respect to a matter prohibited by law, or for a cause of action which requires the proof of an illegal contract to support it, because the injured person happens to be unlawfully traveling on Sunday. The relation of carrier and passenger being established, the courts have refused to deny relief on the ground that to allow it would contravene the general policy of the statute prohibiting Sunday travel, or that the duty which the law in general imposes upon carriers to carry safely does not exist in respect to wrongdoers who are traveling in violation of the statute. It is now almost invariably held that the plaintiff's violation of the collateral statutory duty cannot be regarded in law as an efficient or proximate cause of the injury, and hence is not such contributory negligence as will bar his right to recover and is no defense to the action.<sup>38</sup> The courts of Massachusetts, Maine and Vermont,

38. *Carroll v. Staten Island R. Co.*, 58 N. Y. 125, 134, 17 Am. Rep. 221; *Platz v. City of Cohoes*, 89 N. Y. 219, 42 Am. Rep. 286; *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442, 19 Atl. 178, 1 Am. Ry. & Corp. Rep. 688; *Schmidt v. Humphrey*, 48 Iowa, 652, 30 Am. Rep. 414; *Opsahl v. Judd*, 30 Minn. 129; *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415;

*Norris v. Litchfield*, 35 N. H. 271; *Covey v. Bath*, 35 N. H. 530; *Baldwin* Rep. 414; *Opsahl v. Judd*, 30 Minn. 670; *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *Swisher v. Williams, Wright (Ohio)*, 754; *Knowlton v. Milwaukee City Ry. Co.*, 59 Mo. 278; *Eagan v. Maguire*, 21 R. I. 189, 193, 42 Atl. 506; *Taylor v. Star Coal Co. (Iowa)*, 81 N. W. 249; *City of Kansas City v. Orr (Kan.)*, 61 Pac.

and perhaps of some other States, have in their earlier decisions taken a different view,<sup>39</sup> but the former States have since provided by statute that such a defense shall not be available in actions for personal injuries, and the later decisions in other States now conform to the principles of the rule above stated.<sup>40</sup> Where a railroad company, during the Rebellion, received a company of Confederate soldiers upon its cars, the company was held not liable for negligence in their transportation; the rule *in pari delicto* being applied.<sup>41</sup> So, where an officer of the Confederate army, while absent from service, took passage on a railroad train for the purpose of reporting to his general commanding, the railroad company was held not liable for personal injuries due to its negligence, the act of the officer being illegal.<sup>42</sup>

## § 11. Awaiting and seeking transportation.

Passengers must use the ways and means of going to and from

397; *The Ferryboat S. S. Gregory*, 2 Ben. (U. S.) 226.

39. *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Smith v. Boston & M. R. Co.*, 120 Mass. 490, 21 Am. Rep. 538; *Doyle v. Lynn & B. R. Co.*, 118 Mass. 195, 19 Am. Rep. 431; *Day v. Highland St. Ry. Co.*, 135 Mass. 113, 40 Am. Rep. 447; *Bucher v. Fitchburg R. Co.*, 131 Mass. 156, 41 Am. Rep. 216; *Cratty v. City of Bangor*, 57 Me. 423, 2 Am. Rep. 56; *Davidson v. City of Portland*, 69 Me. 116, 31 Am. Rep. 253; *Johnson v. Town of Irasburgh*, 47 Vt. 28, 19 Am. Rep. 111; *Holcomb v. Town of Danby*, 51 Vt. 428; *Beacham v. Portsmouth Bridge (N. H.)*, 40 Atl. 1066. And see *Bucher v. Cheshire R. Co.*, 125 U. S. 555, holding that such adjudications established a local state law which would be followed in the federal courts in actions arising therein.

40. *Maine Laws*, 1895, Chap. 129; *Mass. Stat.*, 1884, Chap. 37; *McDonough v. Metropolitan R. Co.*, 137 Mass. 210; *Cleveland v. Bangor*, 87 Me. 259, 5 Am. Electl. Cas. 346; *Jordan v. New York, etc., R. Co.*, 165 Mass. 346, 32 L. R. A. 101, 43 N. E. 111; *Boyden v. Fitchburg R. Co.*, 70 Vt. 125, 10 Am. & Eng. R. Cas. N. S. 523, 39 Atl. 771. A railroad company is not relieved from liability for negligently killing a person at a railroad crossing because he was travelling on Sunday in violation of the Vermont statute, where his act did not contribute to the injury; *Hoadley v. International Paper Co.*, 72 Vt. 79, 47 Atl. 169.

41. *Reed v. Muscogee R. Co.*, 48 Ga. 102.

42. *Turner v. North Carolina R. Co.*, 63 N. C. 522.



trains provided at stations for that purpose.<sup>43</sup> They may lawfully use the platforms and premises provided for the use of passengers for any lawful purpose connected with their journey, and have a right to assume that they may be there without being exposed to unnecessary hazard or danger, but their use thereof must be limited to the purposes for which they were manifestly adapted.<sup>44</sup> They are not chargeable with contributory negligence, as a matter of law, if injured while, in the exercise of due care and prudence, they are making use of the platforms and premises and other ways and means provided for their use while awaiting and seeking transportation.<sup>45</sup> But for a failure to use ordinary care and prudence in such use they are guilty of contributory negligence.<sup>46</sup> But the

43. *Cleveland, etc., R. Co. v. Wade*, 18 Ind. App. 346, 48 N. E. 12; *Cincinnati, etc., R. Co. v. Wagner*, 15 Ohio C. C. 395; *Anderson v. Grand Trunk R. Co.*, 24 Ont. App. 672.

44. *Dobiecki v. Sharp*, 88 N. Y. 203; *Weston v. New York Elev. R. Co.*, 73 N. Y. 595; *Dotson v. Erie R. Co.* (N. J.), 54 Atl. 827, and while trains are passing a platform at a station, or are likely to pass, waiting passengers must keep such a distance from the edge of the platform next to the rail that they will not be struck by such projections as usually attach to ordinary trains.

But that one is guilty of contributory negligence in placing himself in a dangerous position on a railroad platform, will not prevent a recovery from the railroad company for an injury inflicted by an approaching train, if the employes of such train saw him in his dangerous position, or, by the exercise of reasonable care, might have discovered the situation in time to have averted the danger.

*Zumault v. Kansas City, etc., Air Line*, 71 Mo. App. 670.

45. *Chicago, etc., R. Co. v. Woolridge*, 32 Ill. App. 237; *Caswell v. Boston, etc., R. Corp.*, 98 Mass. 194, 93 Am. Dec. 151; *Renneker v. South Carolina R. Co.*, 20 S. C. 219, 18 Am. & Eng. R. Cas. 149; *Hartwig v. Chicago, etc., R. Co.*, 49 Wis. 358; *Texas, etc., R. Co. v. Brown*, 78 Tex. 401; *Missouri Pac. R. Co. v. Neiswanger*, 41 Kan. 621, 13 Am. St. Rep. 304; *St. Louis, etc., R. Co., v. Coulson*, 8 Kan. App. 4, 54 Pac. 2, 4 Am. Neg. Rep. 629; *Railroad Co. v. Aller*, 56 Ohio St. 754, 49 N. E. 1114.

46. *Bennett v. New York, etc., R. Co.*, 57 Conn. 422, descending from platform by unlighted instead of a lighted stairway; *Forsyth v. Boston, etc., R. Co.*, 103 Mass. 510, stepping off platform into cattle guard; *Missouri, etc., R. Co. v. Turley*, 85 Fed. 369, 56 U. S. App. 1, 29 C. C. A. 196, stepping off an unrailed platform in the darkness for the purpose of sitting down on its edge, assuming without inquiring or examination that the

question of the passenger's contributory negligence as well as that of the carrier's negligence may be for the jury, as where a passenger standing on a depot platform was struck by a passing train,<sup>47</sup> or where a passenger tripped over a box upon the station platform, when running to catch a train a little distance away, in front of the freight station, and which the company's employes had signaled to the passenger was about to start,<sup>48</sup> or where the passenger fell over certain iron left on the station platform and there was a reasonable amount of room left for passengers to walk in boarding or leaving the cars.<sup>49</sup> A person going to a depot to become a passenger has a right to presume that the platforms are safe, and is not bound to keep a lookout, other than such as ordinary prudence might require.<sup>50</sup> The use by a passenger, in going to get checks for baggage, of a way commonly used between the ticket office and the baggage room, if no danger is apparent, will not be negligence, if the passenger is injured, although he could

ground is level with the platform as at the place where she enters upon it; *Reed v. Axtell*, 84 Va. 231; *Gulf, etc., R. Co. v. Hodges* (Tex. Civ. App.), 24 S. W. 563; *Chewning v. Ensley R. Co.*, 100 Ala. 493, 14 So. 204; *Railroad Co. v. Aller*, 56 Ohio St. 754, 49 N. E. 1114; *Chicago, etc., R. Co. v. Dewey*, 26 Ill. 255, 79 Am. Dec. 374, passing between cars of a freight train about to move; *Smith v. Chicago, etc., R. Co.*, 55 Iowa, 33, passing under one of a train of freight cars.

47. *Dobiecki v. Sharp*, 88 N. Y. 203.

48. *MacLennan v. Long Island R. Co.*, 52 N. Y. Super. Ct. 22, 107 N. Y. 623.

49. *Mathieson v. Burlington, etc., R. Co. (Iowa)*, 100 N. W. 51.

50. *Barker v. Ohio River R. Co.*,

51 W. Va. 423, 41 S. E. 148, and where a person, while trying to get her children on the platform of the depot, steps back into a hole in the platform, she is not guilty of contributory negligence, though, if she had been walking face forward in the direction of the whole, she easily could have seen it.

But one who, in entering a railroad depot, passed over a place made unsafe by an accumulation of ice and knew of its dangerous condition, yet who soon thereafter, while watching upon the platform for the incoming train, stepped backward upon the ice without looking or taking any precautions for his safety, whereby he fell to his injury, is guilty of contributory negligence. *Waterbury v. Chicago, etc., R. Co.*, 104 Iowa, 32, 73 N. W. 341.

have used a different way safely.<sup>51</sup> One is not, as a matter of law, guilty of contributory negligence in attempting to use the approach to a platform of a railroad depot, precluding recovery for injuries due to the steepness of the incline, by the fact that he was acquainted with the conditions and had frequently used the approach.<sup>52</sup>

A person at or near a station awaiting his train is not guilty of contributory negligence in standing near the track, unless so close as to be struck by an ordinary train; and hence pleas not showing that plaintiff was so near the track as to be in danger of an ordinary train are insufficient.<sup>53</sup> But a person standing in close proximity to railroad tracks and in consequence being struck and injured, is guilty of contributory negligence when there was a platform upon which he might have stood in safety.<sup>54</sup> Where a passenger is required to cross a track to reach his train from the station, he is entitled to assume that his safety will not be endangered by a train on the intervening track, and his duty to stop, look, and listen is not the same as that of a person about to cross a public crossing.<sup>55</sup> A passenger has the right to act on the assumption that a carrier will exercise proper care not to injure passengers while passing from the waiting room to the train by the only way open to them.<sup>56</sup> A passenger, who is invited by a carrier to cross a track in going to or leaving his train, is chargeable only with reasonable care, and is not necessarily guilty of contributory negligence in failing to look and listen for an approaching train before crossing; he having the right to believe that

51. *Exton v. Central R. Co.*, 62 N. J. L. 7, 42 Atl. 436, 5 Am. Neg. Rep. 675.

52. *Union Pac. R. Co. v. Evans*, 52 Neb. 50, 71 N. W. 1062.

53. *Louisville & N. R. Co. v. Glasgow* (Ala.), 69 So. 103.

54. *Halbert v. St. Louis, etc., Ry. Co.*, 147 Ill. App. 316.

55. *Keifner v. Pittsburg, etc., Ry.*

*Co.*, 223 Pa. 50, 72 Atl. 253; *St. Louis, etc., Ry. Co. v. Hutchinson*, 101 Ark. 424, 142 S. W. 527; *Hall v. Southern Ry. Co.*, 88 S. C. 430, 70 S. E. 1039; *Harper v. Pittsburg, etc., R. Co.*, 219 Pa. 368, 68 Atl. 831; *Struble v. Pennsylvania Co.*, 226 Pa. 118, 75 Atl. 17.

56. *Atlantic City R. Co. v. Clegg*, 183 Fed. 216, 105 C. C. A. 478.

trains will be so regulated as to permit his crossing in safety.<sup>57</sup> A passenger, while going to the depot to take passage on a train scheduled to stop there at the very instant, may assume that a train on a parallel track will not be running in excess of the maximum speed limit, and that the carrier will not run its trains over the parallel track in such a way as to subject him to unusual danger.<sup>58</sup>

A prospective passenger having gone to a flag station, and taken a position of peril to flag a train, and having stayed there until it was too late to extricate himself and was injured, was negligent.<sup>59</sup> A person, who after flagging the train, started toward the station platform running along the track ahead of the train until struck by it, is guilty of such negligence as prevents his recovery for the injury.<sup>60</sup> One who stepped on a railroad track at a flag station, and while attempting to flag the train by means of lighted matches held in his hand was struck by the train, was guilty of contributory negligence precluding recovery, though the train customarily stopped on such signal, and the glare of the headlight dazzled and frightened such intended passenger, preventing him from recognizing how near the train was.<sup>61</sup>

A person at night signaled a rapidly moving electric car to stop at a highway crossing. The car ran past the crossing and then stopped. He then started to run to catch the car, which commenced to back, and it ran against him. He had an unobstructed

57. *Karr v. Milwaukee Light, etc., Co.*, 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283.

Where an electric railway company maintained between its parallel tracks a night signal device, with directions to passengers to hold up the handle thereof, and thereby cause a light to appear until a car came in sight, and passengers only boarded the cars from the outside rail of each track, the device was an invitation to

passengers to cross the track to give the signal, and to recross to board the car. *Id.*

58. *Illinois Cent. R. Co. v. Daniels*, 96 Miss. 314, 50 So. 721.

59. *Bruff v. Illinois Cent. R. Co.*, (Ky.), 121 S. W. 475.

60. *Pollow v. Texarkan & F. S. Ry. Co.* (Tex. Civ. App.), 119 S. W. 128.

61. *Smith v. Gulf, etc., Ry. Co.* (Tex. Civ. App.), 128 S. W. 1177.

view of the lighted car, and he could have seen it, had he looked. He knew that the car had a superior right of way beyond the crossing. He neither looked nor listened. It was held that he was guilty of contributory negligence as a matter of law, for he could not assume that the motorman would not do his duty and return the car to the crossing.<sup>62</sup> One killed by being struck by a projection from a passing freight train, while standing on the platform at a railroad station, waiting for a train, was not guilty of negligence in being on the platform, unless he knew that the train or projection would extend over same while passing, and he had a right to rely on the safety of the platform as against passing trains.<sup>63</sup> Where plaintiff, a child fourteen years old, while transferring from one train to another at a junction point, was compelled by the crowd to pass through a narrow space between the train and the baggage room, and while so doing a trunk was thrown from a baggage car to the ground, and whirled over by an employe, so that it fell against plaintiff, such fact did not show that the injury was due solely to plaintiff's own negligence.<sup>64</sup>

While it was the duty of a passenger, whose access to the depot had been obstructed by a train standing across the track for an unreasonable length of time, to seek shelter from the cold, and not recklessly remain outside, it was not her duty to enter a nearby store, which, to her knowledge, had the reputation of being a place that a modest woman could not with propriety enter.<sup>65</sup> A passenger has no right to enter a private telegraph office in a station without invitation.<sup>66</sup> The holder of a railroad ticket has the right to rely on the safety of a freight platform without exercising extraordinary care to keep from putting his foot on a rotten

62. *Engler v. International Ry. Co.*, 122 N. Y. Supp. 841, 138 App. Div. 659.

63. *Metcalf v. St. Louis & S. F. R. Co.*, 156 Ala. 240, 47 So. 158.

64. *Grant v. Southern Ry. Co.*, 84 S. C. 114, 65 S. E. 1022.

65. *Louisville & N. R. Co. v. Daugherty*, 32 Ky. Law Rep. 1392, 108 S. W. 336, 15 L. R. A. (N. S.) 740.

66. *Roberts v. Wabash R. Co.*, 153 Mo. App. 638, 134 S. W. 89.

board.<sup>67</sup> That a passenger went from the waiting room to the platform a few minutes before boarding the train where he was injured was not contributory negligence *per se*.<sup>68</sup> The care required of a passenger upon a railway station platform on the approach of a train is that of a reasonably careful and prudent man, when called upon to act under similar conditions, in view of his entire conduct from the time he went upon the platform until injured by a train.<sup>69</sup>

One on a passageway maintained by a railroad company to a train shed at its station, to take a train, must exercise ordinary care for his protection, or he is guilty of contributory negligence.<sup>70</sup> The failure of one, crossing railroad tracks at the station grounds for the purpose of taking passage, to look for approaching trains, was contributory negligence, where she had an unobstructed view of the track for a long distance, and could have avoided being struck, had she looked.<sup>71</sup> Where an intending passenger, while at a place of safety, saw a rapidly approaching train and attempted to cross in front of it without increasing her speed and was struck, she was guilty of contributory negligence barring recovery for her death.<sup>72</sup> In an action for injuries to a passenger while he was walking by the side of a track through a railroad yard to take his train, by being struck by a switch engine approaching from the rear, plaintiff was held negligent as a matter of law.<sup>73</sup> Where plaintiff intending to board a street car got too close to the track

67. *Cassady v. Texas & P. Ry. Co.*, 131 La. 626, 60 So. 15.

68. *Kansas City Southern Ry. Co. v. Watson*, 102 Ark. 499, 144 S. W. 922.

69. *Savageau v. Boston & M. R. R.*, 210 Mass. 164, 96 N. E. 67.

Passenger held guilty of contributory negligence precluding recovery for injury while crossing tracks while going to take a train, although the carrier did not perform its full measure of duty in the manner of

supplying lights for its premises. *Pere Marquette R. Co. v. Strange*, 171 Ind. 160, 84 N. E. 819, rehearing denied 85 N. E. 1026.

70. *Woodbury v. Maine Cent. R. Co. (Me.)*, 85 Atl. 753.

71. *Biggers v. New York Cent., etc., R. Co.*, 141 N. Y. Supp. 827.

72. *Lebrenz v. Pennsylvania R. Co.*, 240 Pa. 495, 87 Atl. 847.

73. *Kaiser v. Northern Pac. Ry. Co.*, 203 Fed. 933.

and was struck by the overhang of the fender, his contributory negligence barred recovery for the railroad company's negligence in operating the car at high speed.<sup>73a</sup> A passenger awaiting a train has the right to assume that water in a cooler at a station is good to drink, in the absence of something to put him on notice that it is not.<sup>73b</sup>

## § 12. Entering conveyance.

It is the duty of a carrier to provide reasonably safe means of ingress and egress to and from its trains, cars, or other vehicles employed for the transportation of passengers, and passengers must use the ways and means of going to and from such trains, cars, or vehicles provided for that purpose with such degree of care as ordinarily prudent and careful persons would exercise in like situations.<sup>74</sup> One who voluntarily and unnecessarily exposes

**73a.** *Townsend v. Houston Electric Co.* (Tex. Civ. App.), 154 S. W. 629.

**73b.** *Trinity & B. V. Ry. Co. v. Smith* (Tex. Civ. App.), 155 S. W. 361.

**74.** *Clark v. Metropolitan St. R. Co.*, 68 App. Div. (N. Y.) 49, 74 N. Y. Supp. 267; *Cleveland, etc., R. Co. v. Wade*, 18 Ind. App. 346, 48 N. E. 12; *Baneroft v. Boston, etc., R. Corp.*, 97 Mass. 275; *Little Rock, etc., R. Co. v. Cavenesse*, 48 Ark. 106; *Central R., etc., Co. v. Perry*, 58 Ga. 461; *West Chicago St. R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958, 9 Am. & Eng. R. Cas. N. S. 364; *Keller v. Hestonville, etc., Pass. R. Co.*, 149 Pa. St. 65; *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42; *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440, passenger entering car from the wrong side guilty of contributory negligence; *Pitcher v. Lake Shore, etc., R. Co.*, 137 N. Y. 568, affg. 16 N. Y.

Supp. 62, but drover entering through a side door of a car containing horses in his charge not guilty of contributory negligence, where it is shown that the end door was used only in case of emergency; *Missouri Pac. R. Co. v. Watson*, 72 Tex. 631, and a pregnant woman stepping from ground to car step three feet high not guilty of contributory negligence, where no other means of entering the car were furnished her; *Atlantic, etc., R. Co. v. Anderson*, 118 Ga. 288, 45 S. E. 271, not contributory negligence to attempt to mount the steps at a point beyond the platform, where no notice of a peculiar method of receiving passengers at a baggage car door had been given. See also, *Peter-son v. Delaware, etc., R. Co.*, 9 Kulp. (Pa.) 552; *Plant Investment Co. v. Cook*, 85 Fed. 611, 52 U. S. App. 566, 29 C. C. A. 377; *Fitchburg R. Co. v. Nichols*, 85 Fed. 954, 50 U. S. App.

himself to a known danger, by attempting to climb on board a moving car, assumes all risks of injury therefrom; and the railroad company is not chargeable with negligence, causing his injury, which results from his falling from the car because of the manner in which its station or platform is constructed.<sup>75</sup> But, unless there is obvious danger in doing so, a passenger about to embark upon a car or boat, is justified in assuming that he can safely follow the directions of the employes in charge in getting on, and is not guilty of contributory negligence in so doing.<sup>76</sup> A person is not guilty of contributory negligence in attempting, after the signal to start has been given, to get on a train which is at rest when he begins his attempt;<sup>77</sup> or in resuming his place without direction from the trainmen where the cars have stopped for dinner and he has alighted for that purpose;<sup>78</sup> or for attempting to board a boat in the evening, instead of waiting until morning, where it was the custom to receive passengers on the boat the night before.<sup>79</sup> But he is chargeable with contributory negligence in attempting to board a train before the proper time and get a seat in the dark before the usual time to light the car.<sup>80</sup> Where a railroad company had for many years run a certain train on the

297, 29 C. C. A. 500; Chicago, etc., R. Co. v. Elliott, 55 Fed. 949, 12 U. S. App. 381. 5 C. C. A. 347, 20 L. R. A. 582; Savannah, etc., R. Co. v. Flaherty, 110 Ga. 335, 35 S. E. 677. See also, Redington v. Harrisburg Tract. Co., 210 Pa. St. 648, 60 Atl. 305, and note, Duty to passenger boarding car, 3 St. Ry. Rep. 762.

75. *Lanterer v. Manhattan R. Co.*, 128 Fed. 540, 63 C. C. A. 38; *Southern R. Co. v. Williams* (Miss.), 36 So. 394; *Wolthers v. Chicago, etc., R. Co.*, 72 Ill. App. 354.

76. *Pence v. Wabash R. Co.*, 116 Iowa, 279, 90 N. W. 59; *Illinois Cent. R. Co. v. Cheek*, 152 Ind. 663, 53 N. E. 641; *Missouri Pac. R. Co. v. Fore-*

*man* (Tex. Civ. App.), 46 S. W. 834; *Clinton v. Root*, 58 Mich. 182, 55 Am. Rep. 671; *Detroit, etc., R. Co. v. Curtis*, 23 Wis. 152, 99 Am. Dec. 141; *Irish v. Northern Pac. R. Co.*, 4 Wash. 48, 31 Am. St. Rep. 899. See *Allenger v. Chicago, etc., R. Co.*, 43 Iowa, 276.

77. *Dawson v. Boston, etc., R. Co.*, 156 Mass. 127, 30 N. E. 466. See also, *Houston, etc., R. Co. v. Schmidt*, 61 Tex. 282.

78. *Larkin v. Oregon Pac. R. Co.*, 15 Or. 220, 34 Am. & Eng. R. Cas. 500.

79. *Skottowe v. Oregon, etc., R. Co.*, 22 Or. 430.

80. *Hodges v. New Hanover Transit Co.*, 107 N. C. 576.



southerly of two tracks, and passengers, in taking said train had been accustomed to pass over the northerly track, lying between it and the station, to reach such train, and a passenger, on such train being announced, left the station to board it, and while passing over the north track to take the train, as he thought, on the south track, as usual, was killed by the train passing on the north track, he was not guilty of contributory negligence in not looking to see which track the train was on.<sup>81</sup> Where, in accordance with a railroad's custom, passengers were allowed to board a freight train at a station before the coach had been drawn up to the depot after the switching had been done, a passenger attempting to enter the coach when it was standing still and injured by the engine backing into the car, as he did so, was not guilty of contributory negligence.<sup>82</sup> A person was not guilty of contributory negligence where injured by a sudden jerk of the car and there was no evidence to show that a reasonable time was allowed him to reach a place of safety after boarding the car before the same was started;<sup>83</sup> where he attempted to board a street car which was not carrying passengers but was proceeding to a shed for the night, unless he knew, or by ordinary care should have known, that the car was not carrying passengers;<sup>84</sup> where he was injured while passing along the inside footboard to a seat, by being struck by a car approaching on a parallel track from the opposite direction, and he had no knowledge that the tracks were so close as to render his act dangerous, although he failed to look around before going onto such footboard;<sup>85</sup> where, wishing to board a street car, he signalled for the motorman to stop, and the car slowed down almost to a standstill, and while he was in the act of stepping on, the motorman

81. *Beecher v. Long Island R. Co.*, 161 N. Y. 222, 55 N. E. 899.

82. *Jones v. New York Cent., etc., R. Co.*, 46 App. Div. (N. Y.) 470, 61 N. Y. Supp. 721. See *Moore v. Railroad Co.*, 119 Mich. 613; *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 394.

83. *Stoddard v. St. Louis, etc., R. Co.* (Mo. App.), 80 S. W. 33.

84. *Leu v. St. Louis Transit Co.* (Mo. App.), 80 S. W. 273.

85. *Kreimelmann v. Jourdan* (Mo. App.), 80 S. W. 323.

called to him to take the next car, and immediately quickened the speed of the car, throwing him off;<sup>86</sup> where he enters an elevator which is apparently at rest and with the door open, and which the passenger has no reason to suppose can be started until the door is closed, though the elevator is moving, which would have been determined by a momentary observation of the car and machinery.<sup>87</sup> But a person was guilty of contributory negligence precluding a recovery where he, intending to take passage on a car and knowing that it had not stopped, seized the hand rail and walked along sideways to get on the car, and, while not looking where he was going, fell into an open manhole near the track, in use by workmen;<sup>88</sup> where he, seeking to board a train and walking between the tracks of a double track railway beside a moving train, upon discovering the approach of a train upon the other track, fails to exercise ordinary care to prevent injury to himself, and go to a place of safety, where there is a reasonable opportunity;<sup>89</sup> where he attempts to board a car moving from four to six miles per hour, and which did not slow up for passengers, in the absence of an invitation by signals or otherwise from the conductor or motor-man;<sup>90</sup> where he signals an electric car to stop at a crossing, and the signal is heeded, and the car is slackening its speed, and he attempts to get on while it is running three miles an hour;<sup>91</sup> where he approached a street car from the rear and did not reach it until after the signal to go ahead had been given and the car had started, and then seized the handrail and attempted to board, though others

86. *Schmidt v. North Jersey St. R. Co.* (N. J.), 58 Atl. 72.

87. *Blaekwell v. O'Gorman Co.*, 22 R. I. 638, 49 Atl. 28. But see *Bremer v. Pleiss*, 121 Wis. 61, 98 N. W. 945.

88. *Sellers v. Union Tract. Co.*, 21 Pa. Super. Ct. 5.

89. *Lake Shore, etc., R. Co. v. Hotchkiss*, 24 Ohio Cir. Ct. Rep. 431.

90. *Fremont v. Metropolitan St. R.*

*Co.*, 83 App. Div. (N. Y.) 414, 82 N. Y. Supp. 307.

91. *Hunterson v. Union Tract. Co.*, 205 Pa. 568, 55 Atl. 543. See also, *Monroe v. Metropolitan St. R. Co.*, 79 App. Div. (N. Y.) 587, 80 N. Y. Supp. 177, the slowing up of the car as it approached the street crossing was not an invitation to the person signaling it to board it before it stopped.

appreciated his danger and sought to warn him;<sup>92</sup> where he attempts to board a railroad train, although it is not possible for want of time allowed for him to board it in safety.<sup>93</sup>

The fact that a passenger knows that the car steps are unreasonably high from a cinder platform at a country station will not prevent him from recovering for injuries in boarding, because of that fact.<sup>94</sup> Where a passenger while boarding a street car was injured by placing his hand on the door as it was opening, the fact that in feeling for the handle plaintiff may have accidentally put his hand on the door before it was entirely open would not constitute contributory negligence if he was in the exercise of due care, and the injury which he received was due either to the negligent manner in which the door was operated or to a defect in the construction of the car.<sup>95</sup> In an action for injuries by being squeezed between two cars at a point where the tracks converged, it was not negligence for plaintiff, attempting to board one of the cars, to let a more infirm person board the car ahead of him.<sup>96</sup> A passenger who steps on a train when it is apparent that a coach is about to be shoved against it with dangerous violence is guilty of contributory negligence.<sup>97</sup> A passenger stepping into the space between a station and a car platform in attempting to board a train on an elevated road is guilty of contributory negligence.<sup>98</sup> The standard for determining whether a person injured by falling into a hole in attempting to board a car used due care is not whether she could by looking have seen the hole, and did not look, but whether it was reasonable conduct for ordinarily prudent people under like

92. *Foster v. Seattle Electric Co.*, 35 Wash. 177, 76 Pac. 995.

93. *Houston, etc., R. Co. v. Stewart*, 14 Tex. Civ. App. 703, 37 S. W. 70.

94. *Louisville & N. R. Co. v. Dyer* (Ky.), 153 S. W. 194.

95. *Carter v. Boston & N. St. Ry. Co.*, 205 Mass. 21, 91 N. E. 142.

96. *Christensen v. Brooklyn Heights R. Co.*, 119 N. Y. Supp. 509, 134 App. Div. 703.

97. *Wise v. Wabash R. Co.*, 135 Mo. App. 230, 115 S. W. 452.

98. *Smith v. Brooklyn Heights R. Co.*, 114 N. Y. Supp. 62, 129 App. Div. 635.

circumstances surrounding the accident to so look as to discover the danger.<sup>99</sup>

### § 13. Entering conveyance.—Elevators.

A person who, during the daytime, opens a substantially closed door of an elevator shaft for the purpose of entering the elevator, and steps into the shaft and is injured, is guilty of contributory negligence.<sup>1</sup> A person who approaches the entrance of an elevator to enter the same should exercise that degree of care which a person of ordinary prudence would exercise under like circumstances.<sup>2</sup> The fact that the door of a passenger elevator is open is not an invitation to enter when no one is in charge; and it is negligence for a person to enter under such circumstances.<sup>3</sup> Plaintiff, a tailor boy, who had been taken in defendant's passenger elevator to a room where he wanted to leave part of the clothes he had with him, not knowing anything about the working of the elevator lever or how it had been left by the elevator boy, and being entitled to think that the elevator boy intended him to re-enter the elevator in his absence for the purpose of being taken to the street, the door being left well open, could be found not guilty of negligence in doing so.<sup>4</sup>

### § 14. Boarding train or car in motion.

It is a general rule of law, established by the decisions in New York and other States, that the boarding of or attempt to board a moving train is presumably and generally a negligent act *per se*, and that in order to rebut this presumption and justify a recovery for an injury sustained in getting on a moving train, it must appear that the passenger was, by the act of the carrier, put to an

99. *Plummer v. Boston Elev. Ry. Co.*, 198 Mass. 499, 84 N. E. 849.

1. *Wheeler v. Hotel Stevens Co.* (Wash.), 127 Pac. 840.

2. *Grimmel v. Bord* (Neb.), 142 N. W. 893.

3. *Kaplan v. J. C. Lyons Building & Operating Co.*, 113 N. Y. Supp. 516, 61 Misc. Rep. 315.

4. *Toohy v. McLean*, 199 Mass. 466, 85 N. E. 578.

election between alternate dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of the train, or some situation created, which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety.<sup>5</sup> It has been held that it is not negligence *per se* to step upon a train moving at two or three miles an hour;<sup>6</sup> to attempt to get on a train at a station after it

5. *N. Y.*—*Hunter v. Cooperstown, etc., R. Co.*, 126 N. Y. 23, 112 N. Y. 371; *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 57 Am. Rep. 760, 27 Am. & Eng. R. Cas. 155; *Paulitsch v. New York Cent., etc., R. Co.*, 102 N. Y. 280; *Connaughton v. Brooklyn, etc., R. Co.*, 13 Misc. Rep. (N. Y.) 403, 34 N. Y. Supp. 243; *Fahr v. Manhattan R. Co.*, 9 Misc. Rep. (N. Y.) 57, 29 N. Y. Supp. 1; *Robinson v. Manhattan R. Co.*, 5 Misc. Rep. (N. Y.) 209, 25 N. Y. Supp. 91; *Philips v. Rensselaer, etc., R. Co.*, 49 N. Y. 177.

*Ala.*—*Montgomery, etc., R. Co. v. Stewart*, 91 Ala. 421.

*Colo.*—*Denver, etc., R. Co. v. Pickard*, 8 Colo. 163.

*U. S.*—*Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 36 Fed. 879.

*Ga.*—*Rieks v. Georgia, etc., R. Co.*, 118 Ga. 259, 45 S. E. 268.

*Ill.*—*Walthers v. Chicago, etc., R. Co.*, 72 Ill. App. 354; *Ohio, etc., R. Co. v. Allender*, 47 Ill. App. 484; *Spannagle v. Chicago, etc., R. Co.*, 31 Ill. App. 460; *Chicago, etc., R. Co. v. Koehler*, 47 Ill. App. 147.

*La.*—*Knight v. Pontchartrain R. Co.*, 23 La. Ann. 462.

*Mass.*—*Harvey v. Eastern R. Co.*, 116 Mass. 269.

*Mich.*—*Cousins v. Lake Shore, etc., R. Co.*, 96 Mich. 386.

*Mo.*—*Fulks v. St. Louis, etc., R. Co.*, 111 Mo. 335, 52 Am. & Eng. R. Cas. 280, attempting to board when warned to the contrary.

*N. C.*—*Browne v. Raleigh, etc., R. Co.*, 108 N. C. 34, 47 Am. & Eng. R. Cas. 544.

*Pa.*—*Bacon v. Delaware, etc., R. Co.*, 143 Pa. St. 14; *Johnson v. West Chester, etc., R. Co.*, 70 Pa. St. 357.

*R. I.*—*Chaffee v. Old Colony R. Co.*, 17 R. I. 658, 52 Am. & Eng. R. Cas. 366.

*Tex.*—*Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189. *Contra*: *Mills v. Missouri, etc., R. Co. (Tex.)*, 59 S. W. 874, 57 S. W. 291. Proof that some one on the train had called on the station, others were also getting on the train, and plaintiff himself and others had previously got on and off at this station when trains were in motion, and it was the custom to slacken the speed of the trains at such station affords no justification, *Philips v. Rensselaer, etc., R. Co.*, 49 N. Y. 177; *Denver, etc., R. Co. v. Pickard*, 8 Colo. 170.

6. *Distler v. Long Island R. Co.*, 151 N. Y. 424, 45 N. E. 937.

has started or from a station platform which it is slowly passing;<sup>7</sup> that whether the train stopped long enough for passengers to get on and other circumstances, may affect the question, and if the evidence is conflicting, the question is for the jury.<sup>8</sup> But attempting to board a train slowly passing or moving out of a station which resulted in the person being injured by falling from the train or being struck by some passing object has been held to be contributory negligence.<sup>9</sup> On the other hand, it cannot be said, as matter of law, that it is always negligent for a person to get upon a street car while it is in motion, irrespective of the rate of speed and other circumstances, though presumptively negligent while the car is moving at ordinary or accelerated speed, especially if the attempt is made between cars or at the front end of the car.<sup>10</sup> Ordinarily it is perfectly safe to get upon a street car moving slowly, and thousands of people do it every day with per-

7. *Houston, etc., R. Co. v. Stewart*, 14 Tex. Civ. App. 703, 37 S. W. 70; *Fulks v. St. Louis, etc., R. Co.*, 111 Mo. 335, 19 S. W. 818; *Baltimore, etc., R. Co. v. Kane*, 69 Md. 11. See also, *Warren v. Southern Kansas R. Co.*, 37 Kan. 408, 31 Am. & Eng. R. Cas. 10.

8. *Swigert v. Hannibal, etc., R. Co.*, 75 Mo. 475, 9 Am. & Eng. R. Cas. 322.

9. *Phillips v. Rensselaer, etc., R. Co.*, 49 N. Y. 177; *McMurtry v. Louisville, etc., R. Co.*, 67 Miss. 601; *Chicago, etc., R. Co. v. Scates*, 90 Ill. 586; *Carroll v. Interstate Rap. T. Co.*, 107 Mo. 653; *Halden v. Great Western R. Co.*, 30 U. C. C. P. 89.

10. *Sahlgaard v. St. Paul City R. Co.*, 48 Minn. 232, 51 N. W. 111; *Mettlestadt v. Ninth Ave. R. Co.*, 4 Robt. (N. Y.) 377. Trying to board a car in rapid motion is negligence,

*Chicago City Ry. Co. v. Delcourt*, 35 Ill. App. 430.

Where plaintiff signaled a street car approaching the crossing on which he was standing to stop, and it slowed down, but did not stop completely, whereupon he attempted to board it while in motion, and after it had passed the crossing, and in doing so was injured and it did not appear that the slowing down of the car was in response to plaintiff's signal, the plaintiff was guilty of contributory negligence. *Reidy v. Metropolitan St. R. Co.*, 27 Misc. Rep. (N. Y.) 527, 58 N. Y. Supp. 326.

Where one stepped aboard a car when it had almost stopped, and was injured by its sudden starting, it cannot be said, as a matter of law, he was guilty of contributory negligence. *Mulligan v. Metropolitan St. R. Co.*, 89 App. Div. (N. Y.) 207, 58 N. Y. Supp. 791.

fect safety. But there may be exceptional cases, when the car is moving rapidly, or when the person is infirm or clumsy, or is incumbered with children, packages, or other hindrances, or when there are other unfavorable conditions, when it would be reckless to do so, and a court might, upon undisputed evidence, hold as a matter of law that there was negligence in doing so. But in most cases it must be a question for the jury, to be determined by them under all the circumstances of the case.<sup>11</sup> The Pennsylvania courts hold that to step on or off a moving car is *per se* negligence, and the burden is upon the plaintiff to clearly demonstrate to the court why his case should go to the jury as a rare exception to this rule.<sup>12</sup>

11. Eppendorf v. Brooklyn City, etc., R. Co., 69 N. Y. 195, 25 Am. Rep. 171; Omaha St. Ry. Co. v. Martin, 6 Am. Electl. Cas. 417, 48 Neb. 65; Corlin v. West End St. Ry. Co., 4 Am. Electl. Cas. 406, 154 Mass. 197, 27 N. E. 1000; Hansberger v. Sedalia El. Ry. & L. Co., 82 Mo. App. 566; North Chicago St. R. Co. v. Kaspers, 186 Ill. 246, 57 N. E. 849; Brown v. Washington & G. R. Co., 25 Wash. L. Rep. 404, 11 App. D. C. 37; North Chicago St. R. Co. v. Wiswell, 168 Ill. 613, 48 N. E. 407, 9 Am. & Eng. R. Cas. (N. S.) 377; Moyland v. Second Ave. R. Co., 128 N. Y. 583, 37 St. Rep. (N. Y.) 871, 27 N. E. 977; Central Pass. R. Co. v. Rose, 15 Ky. L. Rep. 209, 22 S. W. 745; Picard v. Ridge Ave. Pass. R. Co., 147 Pa. St. 195, 1 Pa. Adv. Rep. 218, 23 Atl. 566; McDonough v. Metropolitan R. Co., 137 Mass. 210; Stager v. Ridge Ave. Pass. R. Co., 119 Pa. St. 70; North Birmingham Ry. Co. v. Liddicoat, 99 Ala. 545; Railway Co. v. Atkins, 40 Ark. 423; Railway Co. v. Williams, 140 Ill. 275; Railway Co. v. Spahr, 7 Ind. App. 23; Railroad Co. v. McCandless, 33 Kan. 366; Ober v. Cres-

cent City R. Co., 44 La. Ann. 1059, 11 So. 818, 52 Am. & Eng. R. Cas. 576; Baltimore & O. R. Co. v. Kane (Md.), 13 Atl. 387, 9 Am. St. Rep. 387; New York, etc., R. Co. v. Coulbourn (Md.), 16 Atl. 207; Wyatt v. Railway Co., 55 Mo. 495; Schepers v. Union Depot R. Co., 126 Mo. 665; Sexton v. Metropolitan St. R. Co., 57 N. Y. Supp. 577, 26 Misc. Rep. (N. Y.) 432; Munroe v. Third Ave. R. Co., 18 J. & S. (N. Y.) 114; Finkeldey v. Omnibus Cable Co., 114 Cal. 28; Citizens St. Ry. Co. v. Jolly, 1 St. Ry. Rep. 157 (Ind.), 67 N. E. 935; South Chicago City R. Co. v. Dufresne, 102 Ill. App. 493, affd. 200 Ill. 456, 65 N. E. 1057; Berry v. Utica Belt Line St. R. Co., 76 App. Div. (N. Y.) 490, 78 N. Y. Supp. 542.

12. *Hunterson v. Union Tract. Co.*, 1 St. Ry. Rep. 697 (Pa.), 55 Atl. 543, holding that no recovery can be permitted where it appears that the plaintiff signals an approaching train to stop, whose signal is heeded, but who, before it stops, and while running at a speed of three or four miles an hour, attempts to get on a car; *Powelson v. Union Tract. Co.*, 204 Pa.

The authorities of other States quite generally sustain the opposite view.<sup>13</sup> An attempt to board a stationary car by the front platform is not negligence *per se*.<sup>14</sup> If the passenger be in good physical condition and unincumbered, he may, without negligence attempt to board a slowly moving car under all ordinary circumstances, and it will be even a question for the jury if in boarding he was negligent in not holding fast to the handrail provided for the purpose of aiding him to board.<sup>15</sup> But it has been held to be negligent, as a matter of law, for a person, even in good physical condition and unincumbered, to attempt to get on the front platform of a car moving at an ordinary rate of speed of seven or eight

St. 474; *Stager v. Ridge Ave. Pass. Ry. Co.*, 119 Pa. St. 70; *Walton v. Philadelphia Tract. Co.*, 161 Pa. St. 36; *Jagger v. Peoples Pass. Ry. Co.*, 180 Pa. St. 436.

13. *Cicero & P. St. R. Co. v. Meixner*, 160 Ill. 320, 31 L. R. A. 331, 43 N. E. 823. The court in this case said: "The doctrine is established in nearly all of the States where the question has arisen that it is not negligence *per se* for a passenger to board or alight from a street car operated by horse power while in motion, and the question of contributory negligence is one for the jury. It would be impossible for a court to lay down a rule as to what particular rate of speed would be sufficient notice to a passenger that, if he attempted to get on or off, he would be held guilty of contributory negligence. It would also be a great hardship and unjust to lay down a general rule that a passenger attempting to board a street car while in motion at all should be held guilty of contributory negligence." The

court also considered the question whether the rule as to persons boarding or alighting from horse cars should apply to electric cars, and concludes as follows: "While in electric cars the possibilities of speed are greater than in the case of horse cars, yet the general operation and management of such cars so nearly approach those of horse cars that it must be held that the same rule of law which in the cases cited and a long line of other cases holds that it is not negligence *per se* to board or depart from such cars while in motion is also applicable to electric cars." See also, cases cited in note to § 6, chap. 19.

14. *Pfeffer v. Buffalo Ry. Co.*, 4 Misc. Rep. (N. Y.) 465, 24 N. Y. Supp. 490, 54 St. Rep. (N. Y.) 342, *affd.* 144 N. Y. 636, 64 St. Rep. (N. Y.) 868, 4 Am. Electl. Cas. 444.

15. *Martin v. Second Ave. R. Co.*, 3 App. Div. (N. Y.) 48, 38 N. Y. Supp. 220, 73 St. Rep. (N. Y.) 714; *Morrison v. Broadway, etc., R. Co.*, 130 N. Y. 166, 41 St. Rep. (N. Y.) 248, 29 N. E. 105.



miles an hour.<sup>16</sup> Where, however, provision is made to get on or off the front or rear platform, it may not be negligence to board by the front platform.<sup>17</sup> A person attempting to board a trolley car in motion by way of the front platform is bound to exercise more care than he would had he waited to board by the rear step or for the car to stop. The fact that there was a jerk or sudden movement of the car when plaintiff jumped on the step did not necessarily establish negligence of the motorman. It might have been the natural result of applying the brake to stop the car.<sup>18</sup> It is not *per se* negligence for a person with an umbrella in one hand and a handkerchief in the other, to board or attempt to board an electric car while it is in the act of stopping to receive passengers and before it has come to a full stop.<sup>19</sup>

A passenger is not as matter of law guilty of negligence in entering a street car by the front platform at the invitation of the driver, and proceeding to her seat with her back to the horses, which will preclude her recovery for injuries

16. *Woo Dan v. Seattle El. R. & P. Co.*, 5 Wash. 466, 32 Pac. 103, 58 Am. & Eng. R. Cas. 195.

17. *Peterson v. Delaware, etc., R. Co. (Pa.)*, 9 Kulp. 552. A boy seven years of age, injured in attempting to get upon the front platform of a street railroad car while starting, where no notice was given to the employees in charge of the car and they had no knowledge of his intention and attempt to become a passenger, cannot recover against the company. Although there was no conductor on the car, the driver is not bound to look for passengers while engaged in attending to his horses. *Pitcher v. Peoples St. R. Co.*, 154 Pa. St. 560, 32 W. N. C. 243, 26 Atl. 559.

18. *Paulson v. Brooklyn City R. Co.*, 13 Misc. Rep. (N. Y.) 387, 5 Am. Electl. Cas. 419.

19. *White v. Atlantic Consol. R. Co.*, 92 Ga. 494, 17 S. E. 672. The rule is otherwise, however, if the intending passenger carried a package on his shoulder which obstructed his line of vision so that he fell into an excavation while attempting to reach a slowly moving car. *Hanson v. Third Ave. R. Co.*, 27 Misc. Rep. (N. Y.) 524, 58 N. Y. Supp. 282. And see *Readington v. Philadelphia Tract. Co.*, 132 Pa. St. 154. It is negligence *per se* for a person weighing 200 lbs., and of low stature, to attempt to board a street car moving at the rate of six miles per hour, while both his hands are encumbered by packages. *Baltimore Tract. Co. v. State. Ringgold*, 28 Atl. 397, 78 Md. 409, 58 Am. & Eng. R. Cas. 290.

from being thrown to the floor by the starting of the car, and she did not use the straps placed in the car for passengers to take hold of.<sup>20</sup> Nor is one, as matter of law, guilty of contributory negligence in attempting to board the front platform of a street car while it is in motion, where he has given a signal and the driver has slackened the speed of his horses.<sup>21</sup> But a boy fourteen year old, is not, as matter of law, free from contributory negligence in trying to board an electric car followed by a trailer moving at the rate of from three to seven miles an hour. He is required to exercise such care and caution as might reasonably be expected from one of his age, experience, and intelligence.<sup>22</sup> And where a young man, able-bodied and unincumbered, having motioned for an open car to stop upon a crosswalk, when it had nearly stopped put his foot on the step on the side of and near the middle of the car and took hold of the stanchion, and after the car had moved six or seven feet, he was struck by the wheel of a truck which was standing in the street, it was held that it was plaintiff's duty to see before getting on the car, that there was no obstacle outside the car which would make it dangerous for him to attempt to get on board; and that if the injury was attributable to any negligence, it was, in part at least, that of the plaintiff.<sup>23</sup> It is not necessarily negligent for a passenger to board a street car knowing that the track is being repaired, and that there are iron poles in close proximity to the track on the side of the car on which he is about to enter.<sup>24</sup> But where the plaintiff testified that he signaled the company's motorman to stop; that the car was stopped, and as he stepped on the running board the car was suddenly started, and he was carried about fifteen feet, and struck

20. *Holmes v. Alleghany Tract. Co.*, 153 Pa. 152, 25 Atl. 640.

21. *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 45 Pac. 996, 5 Am. & Eng. R. Cas. N. S. 393.

22. *Sly v. Union Depot R. Co.*, 134 Mo. 681, 36 S. W. 235.

23. *Moylan v. Second Ave. R. Co.*, 128 N. Y. 583, 37 St. Rep. (N. Y.) 871, 27 N. E. 977. But see *San Antonio Tract. Co. v. Bryant* (Tex.), 70 S. W. 1015.

24. *Citizens St. Ry. Co. v. Merl* (Ind. App.), 59 N. E. 491.

by a pillar of an elevated road. He was facing in the direction in which the car moved. Several witnesses testified that the plaintiff jumped on the car while in motion, and swung himself along the running board, and that the conductor warned him when he boarded the car to look out for the pillar. It was held that the plaintiff was guilty of contributory negligence.<sup>25</sup> The controversy being whether defendant's street railway, which ran over plaintiff's intestate as he attempted to board it, was moving slowly, as testified by plaintiff's witnesses, or rapidly, as testified by defendant's witnesses, plaintiff cannot show that it was defendant's custom to stop its cars near the point of the accident to take on passengers; this not being competent to corroborate plaintiff's evidence, and furnishing no excuse for attempting to mount a rapidly moving street car.<sup>26</sup> Where plaintiff boarded one of defendant's street cars at the front platform, and stood there because, according to his testimony, he could not open the door, and when the car ran on a curve he was thrown off and injured, an instruction that it was the duty of the plaintiff to get on the car by the rear platform, and seat himself if he could by reasonable effort, and that his failure to do so was negligence, was erroneous, there being no notice forbidding entrance at the front platform, or apparent danger in so doing, though he apparently might have entered by the rear door.<sup>27</sup>

**25.** *Cassio v. Brooklyn H. R. Co.*, 59 App. Div. (N. Y.) 617, 69 N. Y. Supp. 208.

**26.** *West Chicago St. Ry. Co. v. Torpe*, 187 Ill. 610, 58 N. E. 607.

**27.** *Townsend v. Binghamton R. Co.*, 57 App. Div. (N. Y.) 234, 68 N. Y. Supp. 121.

**Passengers injured in boarding street cars.**—*Gleason v. Metropolitan St. Ry. Co.*, 3 St. Ry. Rep. 709, 99 App. Div. (N. Y.) 209, 90 N. Y. Supp. 1025; *Ward v. Metropolitan St. Ry. Co.*, 3 St. Ry. Rep. 710, 99 App. Div.

(N. Y.) 126, 90 N. Y. Supp. 897; *Wagner v. Brooklyn H. R. Co.*, 3 St. Ry. Rep. 710, 95 App. Div. (N. Y.) 219, 88 N. Y. Supp. 791; *Spencer v. St. Louis Transit Co.*, 3 St. Ry. Rep. 554, 111 Mo. App. 653, 86 S. W. 593; *Lehner v. Metropolitan St. Ry. Co.*, 3 St. Ry. Rep. 555, 110 Mo. App. 215, 85 S. W. 110; *Kaiser v. St. Louis Transit Co.*, 3 St. Ry. Rep. 558, 106 Mo. App. 708, 84 S. W. 199; *McKee v. St. Louis Transit Co.*, 3 St. Ry. Rep. 555, 108 Mo. App. 470, 83 S. W. 1013; *Shanahan v. St. Louis Transit*

A passenger who attempts to board a moving train leaving on schedule time, without an invitation or direction from the conductor or some one in charge, assumes the hazards incident thereto; and where the danger is obviously great and imminent, such an invitation or direction does not relieve him from contributory negligence.<sup>28</sup> Where a person who had frequently boarded a moving street car was asked by the motorman to board a car while moving, there was an invitation to him to board the car.<sup>29</sup> Where plaintiff

Co., 3 St. Ry. Rep. 556, 109 Mo. App. 228, 83 S. W. 784; *Maggioli v. St. Louis Transit Co.*, 3 St. Ry. Rep. 556, 108 Mo. App. 416, 83 S. W. 1026; *Eikenberry v. St. Louis Transit Co.*, 3 St. Ry. Rep. 557, 103 Mo. App. 442, 80 S. W. 360; *McNamara v. St. Louis Transit Co.*, 3 St. Ry. Rep. 558, 106 Mo. App. 349, 80 S. W. 303; *Len v. St. Louis Transit Co.*, 3 St. Ry. Rep. 558 (Mo. App.), 86 S. W. 273, 86 S. W. 137; *Murphy v. North Jersey St. Ry. Co.*, 3 St. Ry. Rep. 632 (N. J. L.), 58 Atl. 1018; *Schmidt v. North Jersey St. Ry. Co.*, 3 St. Ry. Rep. 652 (N. J. L.), 58 Atl. 72; *Jacques v. Sioux City Tract. Co.*, 3 St. Ry. Rep. 249, 124 Iowa, 257, 99 N. W. 1069, as to contributory negligence of passenger in mounting car with an armful of packages. See also as to commencement of relationship of passenger and carrier, *O'Mara v. St. Louis Transit Co. (Mo.)*, 2 St. Ry. Rep. 627, 76 S. W. 680; *Citizens' St. Ry. Co. v. Joly (Ind.)*, 1 St. Ry. Rep. 157, 67 N. E. 935; inference to be drawn by passenger from fact that motorman lessened speed of car, *Mulligan v. Met. St. Ry. Co.*, 2 St. Ry. Rep. 787, 87 App. Div. (N. Y.) 320, 84 N. Y. Supp. 366; it is not contributory negligence as a matter of

law to get upon a street car while in motion. *Clinton v. Brooklyn Hts. R. Co.*, 2 St. Ry. Rep. 791, 91 App. Div. (N. Y.) 374, 86 N. Y. Supp. 932; injured in attempting to board a slowly moving car by sudden start of car, *Maguire v. St. Louis Transit Co. (Mo.)*, 2 St. Ry. Rep. 629, 78 S. W. 838; injured while boarding car by sudden start. *Plum v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 792, 91 App. Div. (N. Y.) 420, 86 N. Y. Supp. 827; *Northington v. Norfolk Ry. & L. Co.*, 2 St. Ry. Rep. 932, 102 Va. 446, 46 S. E. 475; evidence as to rule requiring car to stop, *Nassan Elec. Ry. Co. v. Corliss*, 2 St. Ry. Rep. 999, 126 Fed. 355; safety of passengers embarking, *Leveret v. Shreveport Belt Line Co. (La.)*, 1 St. Ry. Rep. 253, 34 So. 570; to step on or off a moving car is *per se* negligence, and the burden is upon the plaintiff to clearly demonstrate to the court why his case should go to the jury as a rare exception to this rule. *Hunterson v. Union Tract. Co. (Pa.)*, 1 St. Ry. Rep. 697, 55 Atl. 543.

28. *Larson v. Chicago, etc., Ry. Co. (S. D.)*, 141 N. W. 353.

29. *Fultz v. Metropolitan St. Ry. Co. (Mo. App.)*, 148 S. W. 210.

attempted to board a street car after the gates had been closed and the car had started, he was guilty of contributory negligence as a matter of law.<sup>30</sup> Where plaintiff, in attempting to get on the platform of a moving street car, succeeded in getting his feet on the lower step, when he was thrown off by the motion of the car, binding instructions for defendant are proper.<sup>31</sup> Where a train stopped at a station a reasonable time for passengers to board it, and a passenger attempted to board it just as it started, and was injured, the jury could find that the injury was caused by his want of ordinary care in not boarding the train promptly.<sup>32</sup> A street car passenger is bound to act with prudence, and to use the means provided for his safe transportation with reasonable circumspection and care, and to see that the car has stopped, and that he can safely get on before attempting to do so.<sup>33</sup> The rule that it is not negligence *per se* for a strong able bodied man to attempt to board a slowly moving street car applies only in cases where the act is not attended by unusual and extraordinary dangers, and one attempting to board a moving car which had started to run over a viaduct used exclusively for street car traffic is as a matter of law negligent.<sup>34</sup> Plaintiff was guilty of contributory negligence which barred a recovery by attempting to board and in persisting in clinging to a moving car on an elevated railway train after the gates thereon had been closed or were being closed.<sup>35</sup> Injuries received by one intending to become a passenger on, and while attempting to board, an inter-

30. *Sigl v. Green Bay Traction Co.*, 149 Wis. 112, 135 N. W. 506.

31. *Bradney v. Philadelphia R. T. Co.*, 232 Pa. 127, 81 Atl. 187.

32. *Hurt v. Illinois Cent. R. Co.*, 145 Ky. 475, 140 S. W. 650.

The reasonable promptness on the part of a passenger in entering a train depends largely on the particular circumstances, including his physical ability, his incumbrance with baggage, and his being accompanied

by those dependent upon him for attention. *St. Louis, I. M. & S. Ry. Co. v. Hartung*, 95 Ark. 220, 128 S. W. 1025.

33. *File v. Wilmington City Ry. Co.* (Del. Super.), 80 Atl. 623.

34. *Mathew v. Metropolitan St. Ry. Co.*, 156 Mo. App. 715, 137 S. W. 1003.

35. *Plutschow v. Metropolitan W. S. Elev. Ry. Co.*, 155 Ill. App. 589.

urban car in motion and before the car is stopped, are the result of contributory negligence on the part of such prospective passenger. Hence no recovery therefor can be had, especially if the jerking motion complained of was caused by slippery rails while the motorman was attempting to stop the car, the motorman not knowing, or by the exercise of ordinary care not having knowledge, that such passenger was attempting to get on the car.<sup>36</sup> A person, injured while attempting to board a train of cars with closed gates moving away from a station with a quickly increasing speed, is guilty of contributory negligence, defeating a recovery; and this is so, even if the train was moving very slowly at the time he attempted to board it.<sup>37</sup> Where a passenger, having plenty of time to get on a standing train, waited until it began to move, and, in an attempt to get on board by seizing the railing of the car, his body came in contact with trucks left on the station premises and he was injured, he cannot recover on the ground that the railroad was negligent in allowing trucks to be placed near the track.<sup>38</sup> One who attempts to board a moving street car assumes the risk of attempting to board the car, but not of negligence in accelerating speed.<sup>39</sup>

A passenger attempting to board a moving train is generally guilty of contributory negligence, precluding a recovery for the injuries received, though the carrier was guilty in the first place in not stopping its train a reasonable time for the passenger to enter it in safety.<sup>40</sup> To attempt to board a car going faster than a man could walk was negligence barring a recovery for injuries sustained.<sup>41</sup> A street railway passenger may assume that, while

36. *Ohio Cent. Traction Co. v. Mateer*, 31 Ohio Cir. Ct. R. 478, judg. affd.; *Mateer v. Ohio Cent. Traction Co.*, 81 Ohio St. 494, 91 N. E. 1134.

37. *Sheehan v. Nassau Electric R. Co.*, 128 N. Y. Supp. 545.

38. *Southern Ry. Co. v. Nichols*, 135 Ga. 11, 68 S. E. 789.

39. *Orth v. Saginaw Valley Traction Co.*, 162 Mich. 353, 17 Detroit.

40. *Johnson v. St. Joseph Ry., etc., Co.*, 143 Mo. App. 376, 128 S. W. 243.

41. *Quinn v. Philadelphia R. T. Co.*, 224 P. 162, 73 Atl. 319.

boarding a car and passing to a seat, the car would not be started until all danger was removed of its running so near to a team as to injure him.<sup>42</sup> Where a street car stops for a reasonable time for passengers and gives the signal to start before one attempts to enter, the invitation to enter ceases, and one thereafter attempting to enter would be negligent, especially if he heard and understood the signal.<sup>43</sup> Where one pursues a street car after it has started, and in attempting to board it falls, he is guilty of contributory negligence, barring recovery for his injury.<sup>44</sup> It is not negligence for a passenger to board a slowly moving electric car.<sup>45</sup> While plaintiff was attempting to board a slowly moving car, its speed was accelerated and he was struck and injured by a car on an adjoining track, which he had seen. He did not indicate his desire to board the moving car. He admitted that the interval of time between his placing his foot on the running board and the collision was very brief, and that the space between the cars was not wider than a hand. It was held that, if the injury resulted from any negligence, it was plaintiff's more than the company's, preventing recovery from it.<sup>46</sup> Plaintiff went to defendant's passenger station to take one of defendant's local trains. The first train passed the station loaded, without stopping. Shortly after a second train approached at reduced speed, and as it did so the crowd rushed forward to get aboard. The train did not stop, though the speed was reduced to from two to four miles an hour. Plaintiff, who was at the far end of the platform, waited until the last car approached, when he stepped on the lower step of the platform, with both hands holding the guard rails, and while in this position the train gave a sudden jerk, and he fell therefrom and was injured. The train was not scheduled to stop at that station, and was not intending

42. *Lockwood v. Boston Elev. Ry. Co.*, 200 Mass. 537, 86 N. E. 934.

43. *Quinn v. Metropolitan St. Ry. Co.*, 218 Mo. 545, 118 S. W. 46.

44. *Lee v. Rhode Island Co. (R. I.)*, 68 Atl. 475.

45. *Pitard v. New Orleans Ry., etc., Co.*, 120 La. 925, 45 So. 943.

46. *Kriedermaier v. Union Ry. Co. of N. Y. City*, 110 N. Y. Supp.

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to stop there, but reduced speed in response to a block signal prior to being transferred to another track. It was held that plaintiff was negligent as a matter of law, contributing to the accident, and could not recover.<sup>47</sup>

### § 15. Place of entering cars or trains.

Ordinarily, the place to board a train, and the sole place, is that provided by the carrier for that purpose, and it is contributory negligence to enter a train at a place where the carrier is not accustomed to receive passengers.<sup>48</sup> But it is not contributory negligence for a passenger to get on a train at a place where the carrier is in the habit of receiving passengers, although not the regular depot provided for that purpose.<sup>49</sup> It is not negligence *per se* to board a passenger train at a point elsewhere than at a depot platform,<sup>50</sup> but if a railroad company designates and sets apart a platform as the place where it requires all passengers to enter the cars, and this is known to the passengers, and, in disregard of this regulation, the passenger seeks to enter the cars at another place, he is guilty of contributory negligence.<sup>51</sup>

A passenger may board a street car at the places designated by the railway company as stopping points, and at such other points as the railway may stop its cars on the public streets.<sup>52</sup> Where a passenger was injured while attempting to board a street car which

47. *Newmark v. New York Cent., etc., R. Co.*, 111 N. Y. Supp. 379, 127 App. Div. 58.

48. *Phillips v. Northern R. Co.*, 62 Hun (N. Y.), 233, 16 N. Y. Supp. 909; *Central R., etc., Co. v. Perry*, 58 Ga. 461; *Haase v. Oregon R., etc., Co.*, 19 Or. 354, 44 Am. & Eng. R. Cas. 360.

49. *Keating v. New York Cent., etc., R. Co.*, 3 Lans. (N. Y.) 469, *affd.* 49 N. Y. 673.

50. *Stoner v. Pennsylvania Co.*, 98 Ind. 384, 49 Am. Rep. 764; *Curtis v.*

*Detroit, etc., R. Co.*, 27 Wis. 158; *Louisville, etc., R. Co. v. Long*, 94 Ky. 410.

51. *McDonald v. Chicago, etc., R. Co.*, 26 Iowa, 124, 96 Am. Dec. 114.

52. *Moffitt v. Connecticut Co. (Conn.)*, 86 Atl. 16, and a person attempting to board a street car, whether stopped on signal or not, is entitled to rely on the reasonableness of the conduct of the operatives, judged by what they knew, or ought to have known, of the operation of the car.



had stopped at an unsafe place, the question of her negligence depended upon whether she acted as persons of ordinary prudence would have acted under the circumstances.<sup>53</sup> A shipper of live stock who accompanies the stock may rely on the directions of the conductor and station agent as to where the caboose will be, and that it cannot be boarded at the station.<sup>54</sup> A street car passenger, who was directed to change cars at a car barn, could assume that the way he took to board the other car by going around to the other side, after finding that the bars on one side were down, which was the ordinary and natural way of doing so, was safe and unobstructed.<sup>55</sup> Where, though plaintiff knew that the tracks where he attempted to board a street car ran close together so that the bumpers of passing cars sometimes touched, he also knew that it was defendant's practice to avoid having cars pass at that point, and the place where he attempted to board the car was provided by defendant for taking on passengers, he could assume that there was no danger from passing cars on the other track and was not bound to watch a car on the other track on the other side of the cross-street to see if it was going to pass the car he was boarding.<sup>56</sup> A passenger, injured by the starting of a street car while boarding it, was not guilty of contributory negligence in boarding by the side away from the curb, where the car was an open one with a running board on either side.<sup>57</sup> A railroad company placed a freight train on a switch between its depot building and a passenger train on the regular track. A passenger, intending to board

53. *Haas v. Wichita R. & L. Co.*, 89 Kan. 613, 132 Pac. 195.

54. *Chorn v. Missouri, etc., Ry. Co.*, 168 Mo. App. 518, 153 S. W. 1060.

55. *Gurley v. Springfield St. Ry. Co.*, 206 Mass. 534, 92 N. E. 714.

The rule for determining whether a person, injured in attempting to board a street car by stepping into the space between the curved end of a platform and the car steps, used due

care, is not whether by looking she could have seen the open space, but whether, under the circumstances of the accident, an ordinarily prudent person would have discovered the opening. *Brisbin v. Boston Elevated Ry. Co.*, 207 Mass. 553, 93 N. E. 572.

56. *Scott v. Metropolitan St. Ry. Co.*, 137 Mo. App. 196, 120 S. W. 131.

57. *Costello v. St. Louis Transit Co.*, 119 Mo. App. 391, 96 S. W. 425.

the passenger train, stepped upon a flat car in the freight train directly in front of the depot building and undertook to jump from the top of it to the platform of the passenger train. His foot caught in a stirrup in the top of the flat car, and he was injured. The flat car was not out of order. It was held that the passenger was, as a matter of law, guilty of contributory negligence, precluding a recovery, though the freight train should have been cut in two, and a way opened for passengers to walk from the depot to the passenger train.<sup>58</sup>

### § 16. Riding in dangerous position.

A passenger who, without any reasonable cause or excuse, assumes a dangerous position on the platform or steps or in the car of a railroad train while it is in motion, or in any place not designed for the carriage of passengers is guilty of contributory negligence which may bar his recovery of damages for an injury resulting from the concurring negligence of the carrier.<sup>59</sup> But while he in-

53. *Louisville & N. R. Co. v. Lawler*, 32 Ky. Law Rep. 994, 107 S. W. 702, rehearing denied 109 S. W. 908.

59. *St. Louis, etc., R. Co. v. Leftwich*, 117 Fed. 127, 54 C. C. A. 1; *Kerr v. Chicago, etc., R. Co.*, 100 Ill. App. 148; *Myers v. Nashville, etc., R. Co.* (Tenn.), 72 S. W. 114; *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10, 13 Am. & Eng. R. Cas. 10, riding on top of a cattle car; *Jackson v. Crilly*, 16 Colo. 103, sitting on railing of open car; *Hickey v. Boston, etc., R. Co.*, 14 Allen (Mass.) 429; *Carroll v. Inter-State Rap. T. Co.*, 107 Mo. 653, 52 Am. & Eng. R. Cas. 273; *Ashbrook v. Frederick Ave. R. Co.*, 18 Mo. App. 290; *Tuley v. Chicago, etc., R. Co.*, 41 Mo. App. 432, riding on top of a caboose of a freight train; *Higgins v. Cherokee R. Co.*, 73 Ga. 149, riding in

open flat car; *Smith v. Richmond, etc., R. Co.*, 99 N. C. 241, 34 Am. & Eng. R. Cas. 557, sitting on arm of seat in car of train used partly for freight; *Freeman v. Pere Marquette R. Co.*, 9 Det. L. N. 436, 91 N. W. 1021; *Norfolk, etc., R. Co. v. Ferguson*, 79 Va. 241, sitting in chair instead of stationary seat provided for passenger. See also *Beidler v. Banshaw*, 200 Ill. 425, 65 N. E. 1086, as to riding on an elevator; *Bard v. Pennsylvania Tract. Co.*, 6 Am. Electl. Cas. 444, 76 Pa. St. 97, 34 Atl. 953. See also *Grieve v. New Jersey St. Ry. Co.*, 64 N. J. L. 409, 47 Atl. 427.

But it has been held not to be contributory negligence, under certain circumstances, to occupy a chair instead of a stationary seat, *Quackenbush v. Chicago, etc., R. Co.*,

curs the risks arising from his exposed situation, he does not assume those which are not inherent in or do not arise in consequence of the position he occupies, but result from the negligence of the carrier to which his negligence in no way contributed.<sup>60</sup> A passenger who leaves his proper position in the car and takes a place on the engine without being assigned to such place by an authorized servant of the carrier,<sup>61</sup> or an employe unnecessarily riding on the pilot of the engine or on the platform at the end of the tender, even with the knowledge of the conductor or trainmen,<sup>62</sup> and, by reason of being there is injured, is guilty of contributory negligence which will prevent his recovery, unless his injury is due to the wanton or intentional negligence or misconduct of the carrier or its servants, or such reckless misconduct as is the equivalent thereof.<sup>63</sup> If a passenger on a train, without the direction of or in violation of the rules of the carrier, leaves his seat in a passenger coach and

73 Iowa 458; or to ride in an open flat car, *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512; or to ride on the running board of an excursion train, *Dickinson v. Port Huron, etc., R. Co.*, 53 Mich. 43; or in the carriage way of a ferry boat when crowded out of the passenger way, *Cleveland v. New Jersey Steam-boat Co.*, 68 N. Y. 306; *Hazman v. Hoboken Land, etc., Co.*, 2 Daly (N. Y.) 130; or to stand on the stairway of a ferry boat at the time of landing, *Bartlett v. New York, etc., Ferry, etc., Co.*, 57 N. Y. Super. Ct. 348, 130 N. Y. 659.

60. *Paquin v. St. Louis & S. Ry. Co.*, 90 Mo. App. 118; *New York, etc., R. Co., v. Ball*, 53 N. J. L. 283, 21 Atl. 1052; *Keith v. Pinkham*, 43 Me. 501, 69 Am. Dec. 80; *Hanson v. Mansfield R., etc., Co.*, 38 La. Ann. 111, 58 Am. Rep. 162; *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 166, 42 Am. Rep. 208.

61. *Radley v. Columbia Southern R. Co. (Or.)*, 75 Pac. 212; *Files v. Boston, etc., R. Co.*, 149 Mass. 204, 14 Am. St. Rep. 411; *Brown v. Searboro*, 97 Ala. 316; *Virginia Midland R. Co. v. Roach*, 83 Va. 375; *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, 5 Am. St. Rep. 510, a question of fact for the jury, where directed or invited by those in charge of the engine. See *Hanson v. Mansfield R. etc., Co.*, 38 La. Ann. 111, 58 Am. Rep. 162, not negligent *per se* where invited by conductor.

62. *Lehigh Valley R. Co. v. Greiner*, 113 Pa. St. 600; *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732; *Shuler v. Chesapeake, etc., R. Co.*, 81 Va. 188.

63. *Illinois Cent. R. Co. v. Brown*, 77 Miss. 338, 28 So. 949; *Grieve v. North Jersey St. Ry. Co. (N. J.)*, 47 Atl. 427.

goes into the baggage or express car, and is injured, it has been held that he is guilty of contributory negligence, particularly where he would not have been injured had he remained in another car.<sup>64</sup> But if his injury could not be traced to his presence in the baggage car, or it was no more dangerous a place than the passenger coach or was a safer place,<sup>65</sup> or he entered the baggage car for safety, in apprehension of a collision,<sup>66</sup> the question of contributory negligence may properly be submitted to the jury. If the passenger is riding in the baggage car by invitation or permission of the conductor and is injured in consequence of a collision, being lawfully there, he is not guilty of contributory negligence.<sup>67</sup>

A street car passenger riding on a bumper does not assume the negligence of the carrier.<sup>68</sup> A passenger in taking a place of danger does not thereby contract to discharge the carrier from the duty it owes him of protection from its own acts of negligent operation of defective cars or the operation of cars upon defective rails.<sup>69</sup> Where at the place from which a free train of fourteen cars was to run, the cars being crowded, a number of persons, with the acquiescence of the conductor, went to the tops of the cars, and by the jerking

64. *Peoria, etc., R. Co. v. Lane*, 83 Ill. 448; *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 28, 37 Am. Rep. 651; *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 165, 42 Am. Rep. 208; *Houston, etc., R. Co. v. Clemmons*, 55 Tex. 88, 40 Am. Rep. 799; *New York, etc., R. Co. v. Ball*, 53 N. J. L. 283; *Florida Southern R. Co. v. Hirst*, 30 Fla. 1, 32 Am. St. Rep. 17; *Jones v. Chicago, etc., R. Co.*, 20 Minn. 125, 18 Am. Rep. 360.

65. *Webster v. Rome, etc., R. Co.*, 115 N. Y. 112.

66. *Cody v. New York, etc., R. Co.*, 151 Mass. 462.

67. *Carroll v. New York, etc., R. Co.*, 1 Duer (N. Y.) 584, 11 N. Y.

Leg. Obs. 144; *Washburn v. Nashville, etc., R. Co.*, 3 Head (Tenn.) 644, 75 Am. Dec. 784. See also *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230.

68. *Kirkpatrick v. Metropolitan St. Ry. Co.*, 161 Mo. App. 515, 143 S. W. 865.

Where plaintiff was injured while riding on the rear bumper of a crowded car, he assumed the risk incident to that position, although his fare was accepted. *Feldheim v. Brooklyn, etc., R. Co.*, 107 N. Y. Supp. 413, 122 App. Div. 883.

69. *Hickey v. Chicago City Ry. Co.*, 148 Ill. App. 197.

and bumping of the cars, caused by the slack being taken up as the train slowed down on reaching its destination, and without any negligence in its operation, two of such persons were thrown from the train, this was due simply to a risk they had assumed, so that the carrier was not liable.<sup>70</sup> Where plaintiff was injured while riding in a freight car, he assumed the risk incident to the movement of such trains carefully managed, including the necessary bumping and coupling, but did not assume the risk of any unnecessary bumping, particularly when resutling from the negligence of train operatives; the carrier being required to exercise the utmost care consistent with the prudent ordinary operation of such trains.<sup>71</sup> Plaintiff having voluntarily placed himself in a place of danger, as the result showed, he was negligent, though he may not have anticipated danger.<sup>72</sup> It is the duty of a passenger, on boarding a train, to place himself in a safe position thereon, if he is able to find one, and it is no excuse for his placing himself in an unsafe position that the trainmen knew that it was unsafe and did not prevent his occupying it, if his danger was equally well known to him.<sup>73</sup> A passenger on an electric car is guilty of contributory negligence precluding a recovery where he took a position in the baggage compartment instead of in the passenger coach.<sup>74</sup> But a

70. *Patterson's Adm'r v. Louisville & N. R. Co.*, 138 Ky. 648, 128 S. W. 1068.

71. *Louisville & N. R. Co. v. Campbell* (Ky.), 122 S. W. 848.

72. *Fusselman v. Wabash R. Co.*, 139 Mo. App. 198, 122 S. W. 1137.

73. *Winters v. Baltimore & O. R. Co.*, 163 Fed. 106.

Plaintiff, a member of defendant's track repairing gang, was injured by the derailment of a car of the train on which plaintiff was being carried to his home by defendant after termination of the day's work. Defendant provided two box cars and a ca-

boose in which to carry plaintiff and his fellow workmen, but plaintiff, in accordance with a prior custom, known to his foreman, climbed on top of one of the cars and rode there, and at the time of the derailment was either thrown or jumped to the ground, and sustained the injury complained of. No one else was injured, and if plaintiff had remained in the cars or caboose he would not have been injured. It was held that plaintiff was negligent as a matter of law, precluding a recovery. *Id.*

74. *Dawson v. Maryland Elec. Rys. Co.* (Md.), 86 Atl. 1041.

carrier of passengers is not allowed to overcrowd its vehicles or cars, and a passenger who goes on a train for passage is not negligent in occupying a position in the baggage compartment of a combination car where there are no unoccupied seats in the passenger compartments or coaches.<sup>75</sup> If a passenger, in the absence of an emergency requiring it, rides in a place of obvious danger which he knows, or by the exercise of ordinary care should know, is not provided for passengers, and such act contributes proximately to his injury, he is guilty of contributory negligence and cannot recover.<sup>76</sup> A passenger on a street car should take the place on the car assigned to him by the conductor, unless the danger in so doing is so apparent that a reasonably prudent person would not assume it;<sup>77</sup> and a passenger cannot be charged with contributory negligence on account of taking a place on a crowded street car designated by the conductor of the car.<sup>78</sup> Where a mother with three children boarded an open street car, and permitted a child seven years of age to sit at the end of a seat next to a wire screen designed to protect passengers; the screen did not reach to the floor of the car, and, while it was going around an abrupt curve, the child was thrown from the seat under the wire screen to the ground, and killed, the mother was not guilty of contributory negligence precluding a recovery.<sup>79</sup> One riding on the logging train of a logging company, with its implied consent, does not assume the risk of collision through its negligence with another of its trains.<sup>80</sup> Where plaintiff was injured by being in a freight car when it was being switched, the fact that he was traveling on the train under a contract that he would not be in any freight car while switching was being done would not bar a recovery, unless his negligence in

75. *Lane v. Choctaw, etc., R. Co.*, 19 Okl. 324, 91 Pac. 883.

76. *McLean v. Atlantic Coast Line R. Co.*, 81 S. C. 100, 61 S. E. 900.

77. *Mittleman v. Philadelphia Rap. T. Co.*, 221 Pa. 485, 70 Atl. 823, 18 L. R. A. (N. S.) 503.

78. *Boesen v. Omaha St. Ry. Co.*, 79 Neb. 381, 112 N. W. 614.

79. *Indianapolis Traction, etc., Co. v. Beckman*, 40 Ind. App. 100 81 N. E. 82.

80. *Harvey v. Deep River Logging Co.*, 49 Or. 583, 90 Pac. 501.

not being aware that switching was being done contributed to the accident.<sup>81</sup> A passenger taking passage on a special freight train, carrying with his knowledge a car loaded with dynamite, did not take the risk of an explosion of the dynamite proximately caused by the negligence of the carrier, and he was not guilty of contributory negligence precluding a recovery for injuries caused by the derailment of the car through the negligence of the carrier and the explosion of the dynamite thereby.<sup>82</sup> In an action for injuries to a passenger in a collision caused by backing of cars against a standing caboose, in which plaintiff was sitting, with the knowledge and consent of the carrier's servants, in order to show plaintiff guilty of contributory negligence, the jury must find that he knew or should have known that the front part of the caboose where he took his seat was not intended for passengers; that it was more dangerous than the rear part; that, under all the circumstances, he failed to exercise ordinary care in taking his seat there, with the knowledge of the flagman and without warning from him; and that his conduct proximately caused or concurred in causing the injury.<sup>83</sup>

### § 17. Standing in car.

A contract requiring a railroad corporation to furnish a passenger a seat does not, as matter of law, oblige him to keep it from the time he first takes it until the train has come to a final stop at the place of his destination.<sup>84</sup> It cannot therefore be held, as a matter of law, that a passenger in a crowded railroad car, by surrendering his seat to one less able to stand than himself,<sup>85</sup> or who temporarily leaves his seat for a legitimate reason and is compelled to stand in the aisle because, when

81. *Hardin v. Ft. Worth & D. C. Ry. Co.* (Tex. Civ. App.), 100 S. W. 995.

82. *Roberts v. Sierra Ry. Co. of California*, 14 Cal. App. 180, 111 Pac. 519, rehearing denied 111 Pac. 527.

83. *Miller v. Atlanta, etc., Ry. Co.*, 144 N. C. 545, 57 S. E. 345.

84. *Barden v. Boston, etc., R. Co.*, 121 Mass. 426.

85. *Trumbull v. Erickson*, 97 Fed. 891, 38 C. C. A. 536.

he returns, the seat is occupied,<sup>86</sup> is guilty of negligence which precludes his recovery for an injury received through the negligence of the carrier, although such injury would not have been received had he retained his seat. Nor a passenger who left his seat in the car to pick up a package belonging to him,<sup>87</sup> or the overcoat of a fellow passenger,<sup>88</sup> and was thrown down and injured. But standing near an open side door of a car when the train is starting or in motion,<sup>89</sup> or while the train is stopped, standing by the door of the car, the door shutter being open, with his hand resting on the door frame against which the shutter is closed,<sup>90</sup> or standing up in a freight train where he could have known by the exercise of ordinary care, that the train had stopped to do switching, and that part of the train was likely to be backed against the part to which the caboose was attached, which would probably produce concussion in the caboose,<sup>91</sup> has been held to be contributory negligence which would bar a passenger's recovery for injury. Where a passenger was standing at the rear door of a coach, viewing the scenery, his left hand resting on the water closet door to brace himself, and the conductor, approaching from behind opened the closet door and shut it quickly, catching and crushing the passenger's little finger, which had slipped into the crevice without his knowledge; the passenger testified that the conductor said he saw him there, and ought to have spoken to him, and that he did not hear the conductor approaching, it was held that the questions of the defendant's negligence and the plain-

86. *Holland v. St. Louis, etc., R. Co.*, 105 Mo. App. 117, 79 S. W. 508.

87. *Condy v. St. Louis, etc., R. Co.*, 13 Mo. App. 587, 85 Mo. 79.

88. *Wallace v. Western North Carolina R. Co.*, 101 N. C. 454, 37 Am. & Eng. R. Cas. 159.

89. *Thompson v. Duncan*, 76 Ala. 334. See also *Gee v. Metropolitan R. Co.*, L. R. 8 Q. B. 161; *Warburton v. Midland R. Co.*, 21 L. T. N. S. 835.

holding it to be a question for the jury

90. *Texas, etc., R. Co. v. Overall*, 82 Tex. 247; *Richardson v. Metropolitan R. Co.*, 37 L. J. C. P. 300.

91. *Harris v. Hannibal, etc., R. Co.*, 89 Mo. 233, 58 Am. Rep. 111, 27 Am. & Eng. R. Cas. 216; *Koumm v. St. Louis, etc., R. Co. (Ark.)* 76 S. W. 1075, passengers standing up to get a drink.



tiff's contributory negligence were for the jury.<sup>92</sup> The New York courts hold that where a passenger leaves his seat with a view of leaving the car as soon as the train stops, as passengers usually do, he has a right to assume that the train will be stopped in the usual manner, and he is not chargeable with contributory negligence, if injured by a sudden jerk of the car, although it is probable that if he had retained his seat he would not have been injured.<sup>93</sup> But in Pennsylvania such an act has been held to be contributory negligence,<sup>94</sup> and also in Kentucky, where the passenger leaves his seat and stands by the door before the train stops, if injuries are sustained by a fall caused by the stopping of the train with no more jerk than incident to its stoppage in the exercise of the proper care.<sup>95</sup> In other cases it has been held that whether a passenger, in leaving his seat and making his way to the door of the car in order to get off at a station which a train is approaching, exercised due care and whether the carrier negligently and improperly managed its trains under the circumstances, should be submitted to the jury.<sup>96</sup> It has been held that a passenger boarding a mixed train composed of freight and passenger cars, the starting of which involves jerking and jostling endangering the safety of unseated passengers, is bound to exercise ordinary care in obtaining a seat, and is guilty of contributory negligence in failing to do so.<sup>97</sup> And so,

92. *Romine v. Evansville, etc., R. Co.* (Ind. App.), 56 N. E. 245, citing *Thurber v. Harlem Bridge, etc., R. Co.*, 60 N. Y. 326; *Wylde v. Northern R. Co.*, 53 N. Y. 156; *Baker v. Manhattan R. Co.*, 118 N. Y. 533, 23 N. E. 885, and other cases. See also *Bringer v. Louisville & N. R. R. Co.*, 24 Ky. L. Rep. 1973, 72 S. W. 783.

93. *Bartholomew v. New York Cent., etc., R. Co.*, 102 N. Y. 716, 27 Am. & Eng. R. Cas. 154; *Wylde v. Northern R. Co.*, 53 N. Y. 156; *Nicholas v. Sixth Ave. R. Co.*, 38 N. Y. 131, 97 Am. Dec. 780; *Willis v. Long Island R. Co.*, 34 N. Y. 670.

94. *Dunn v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 258.

95. *Illinois Cent. R. Co. v. Jolly*, 25 Ky. L. Rep. 1735, 78 S. W. 476.

96. *Treat v. Boston, etc., R. Co.*, 131 Mass. 371, 3 Am. & Eng. R. Cas. 423; *Barden v. Boston, etc., R. Co.*, 121 Mass. 426; *Morgan v. Southern Pac. R. Co.*, 95 Cal. 501; *New Jersey R. Co. v. Pollard*, 22 Wall. (U. S.) 341.

97. *Macon, etc., R. Co. v. Moore*, 108 Ga. 84, 33 S. E. 889, 6 Am. Neg. Rep. 451, 15 Am. & Eng. R. Cas. N. S. 842.

where a passenger, entering a passenger train which has stopped a reasonable time for passengers to enter and be seated in the cars, fails to take a seat and is thrown down and injured by the starting of the train. But where a passenger enters a car and finds no seat vacant and is injured while searching for a seat,<sup>99</sup> or while standing in the car, after having looked through several cars for a seat and abandoned the search,<sup>25</sup> he is not guilty of contributory negligence, although there were vacant seats in another part of the train. He is not guilty of negligence *per se* in not taking the first seat and in not looking to see whether other cars for a seat and abandoned the search,<sup>1</sup> he is not guilty of contributor.<sup>2</sup> A man who surrenders his seat on a crowded street car to a woman, and stands on the running board of the car, is not, as a matter of law, negligent.<sup>3</sup> One who boarded an open, crowded electric car stopping for passengers, and was injured, while standing on the running board, facing the inside of the car, looking for a seat, as the car was passing a van, was not guilty of contributory negligence as a matter of law, since whether, when the car passed the van, reasonable care required that he should observe the side of the street, rather than to see if there was a vacant place within the car, was a question for the jury.<sup>4</sup>

A passenger on an open street car, who voluntarily rides standing between two seats, assumes the manifest inconveniences and risks incident to proper operation of the car; but in so riding he is not guilty of such contributory negligence as prevents recovery for injury resulting from negligent operation of the car.<sup>5</sup> A pas-

98. *International, etc., R. Co. v. Copeland*, 60 Tex. 325.

99. *Pollard v. New York, etc., R. Co.*, 7 Bosw. (N. Y.) 437.

1. *Farnon v. Boston & A. R. Co.*, 180 Mass. 212, 62 N. E. 254.

2. *Moore v. Saginaw, etc., R. Co.*, 119 Mich. 613, 78 N. W. 656, 5 Det. L. N. 936, 6 Am. Neg. Rep. 89.

3. *Brainard v. Nassau Electric R. Co.*, 44 App. Div. (N. Y.) 613, 61 N. Y. Supp. 74.

4. *Henderson v. Nassau Electric R. Co.*, 46 App. Div. (N. Y.) 280, 61 N. Y. Supp. 690.

5. *Kebbee v. Connecticut Co.*, 85 Conn. 641, 84 Atl. 329.

senger who stood in the doorway of a crowded passenger car when the adjoining coach was empty could not recover for injuries from being thrown by a jolt.<sup>6</sup> Where the caboose of a freight train carrying passengers was so full when plaintiff boarded it that plaintiff could not get a seat, he was not negligent merely because he stood in the aisle.<sup>7</sup> An experienced traveler was chargeable with knowledge of the danger of standing in the aisle of a coach in a mixed train while the engine was switching, so as to prevent recovery for injuries received from a collision of the cars while in such position, whether or not warning signs were posted in the coach.<sup>8</sup> Where plaintiff boarded the smoking car of a railroad train, and, seeing no vacant seats, stood within three inches of the door, supporting himself with his hands, while the train traveled a distance of three-fourths of a mile, and was thrown through the open door onto the platform and off the train on its crossing a switch, he was guilty of contributory negligence and could not recover for his injuries.<sup>9</sup> Where plaintiff's intestate, while a passenger on defendant's car, rose from her seat to attract the attention of the conductor; the car was in rapid motion and swaying violently; she stood facing the rear of the car with one hand on the back of her seat, until she was thrown to the ground when the motion of the car was checked by the brakes; and she knew that the track was uneven, and that the car for that reason was liable to sway, she was not in the exercise of due care, and a verdict for the defendant was properly directed.<sup>10</sup> Plaintiff and his brother-in-law were riding on a railroad train, guarding a negro. On the announcement of the station where they intended to alight, plaintiff, for the purpose of resuming custody of the negro and of

6. *Shive v. Philadelphia & R. Ry. Co.*, 235 Pa. 256, 83 Atl. 707.

7. *Tickell v. St. Louis, etc., Ry. Co.*, 149 Mo. App. 648, 129 S. W. 727.

8. *Gabriel v. St. Louis, etc., Ry. Co.*, 135 Mo. App. 222, 115 S. W. 3.

9. *Foley v. Boston & M. R. R.*, 193 Mass. 332, 79 N. E. 765, 7 L. R. A. (N. S.) 1076.

10. *Cottrell v. Pawtucket St. Ry. Co.*, 27 R. I. 565, 65 Atl. 269.

getting off quickly, left his seat in the smoking compartment while the train was in motion, and went forward through the colored compartment to the front door of the car, which he opened, and stood there waiting for the train to slow down, with his right foot on the door sill, his left foot on the platform, and his right hand on the door facing, from which position he was knocked or pushed by the train porter, so that he fell from the car while the train was in rapid motion, and was injured. It was held that plaintiff was guilty of contributory negligence in taking the position he did, and was not entitled to recover, in the absence of proof that the action of the train porter was willful.<sup>11</sup> Violation of a rule, notice of which is properly displayed, forbidding passengers to stand in a car, by standing for an unreasonable length of time, constitutes negligence *per se*.<sup>12</sup> In an action for injuries to a street car passenger, who was thrown to the street while the car was rounding a curve, a request for a ruling that passengers may assume that a car will be operated in view of the fact that some of the passengers may be standing in the car or on the platform was properly refused, where the car was almost empty, making it unnecessary for plaintiff to stand, and where there was no showing that the motorman knew plaintiff was on the platform with the conductor's consent.<sup>13</sup> It is not contributory negligence to stand inside an electric car when the seats are all occupied.<sup>14</sup> A passenger was not guilty of contributory negligence as a matter of law in failing to take her seat before the car started, though she had time to do so and there were vacant seats.<sup>15</sup> The fact that after a passenger entered the car she walked up the aisle five or six feet before the car started, did not preclude the jury from finding that in proceeding towards the front of the car she was

11. Illinois Cent. R. Co. v. Warren, 149 Fed. 653, 79 C. C. A. 350.

12. St. Louis, etc., Ry. Co. v. Harmon, 85 Ark. 503, 109 S. W. 295.

13. Zamore v. Boston Elev. Ry. Co., 198 Mass. 594, 84 N. E. 858.

14. Grotzsch v. Steinway Ry. Co. of Long Island City, 45 N. Y. Supp. 1075, 19 App. Div. 130.

15. Cutcliff v. Birmingham Ry., etc., Co., 148 Ala. 108, 41 So. 873.

exercising ordinary care, even if she did pass an empty seat which she could have taken.<sup>16</sup> Where defendant was standing on an open street car at the time of the accident, though she had been warned to keep her seat, it was held that a binding instruction for defendant should have been given.<sup>17</sup> Where plaintiff, while standing in the closet of defendant's passenger car, was thrown against a step-ladder, leaning against the wall of the closet, by a sudden lurch of the train, and in consequence of which he fell against the window, breaking the glass, and injuring his eye and face, such facts did not raise the issue of contributory negligence.<sup>18</sup>

### § 18. Riding on platform, steps, or running board.

Riding on the platform or steps of a steam railroad car when the train is under full headway or moving rapidly is *prima facie* negligence on the part of a passenger and will bar his recovery for injuries sustained, in the absence of affirmative proof excusing such act.<sup>19</sup> A passenger who voluntarily and unnecessarily takes a position on the platform or steps of a steam railroad car while it is in motion, and is injured, is guilty of contributory negligence which will prevent his recovery for such injury;<sup>20</sup> for example, where he has been requested or warned to enter the car,<sup>21</sup> or is so riding in violation of the carrier's rules,<sup>22</sup> or when he knows that the train

16. *Weeks v. Boston Elev. Ry. Co.*, 190 Mass. 563, 77 N. E. 654.

17. *Jackson v. Philadelphia Traction Co.*, 182 Pa. 104, 37 Atl. 827.

18. *St. Louis S. W. Ry. Co. of Texas v. Smith* (Tex. Civ. App.), 86 S. W. 943.

19. *Hicks v. Georgia, etc., R. Co.*, 108 Ga. 304, 32 S. E. 880, 14 Am. & Eng. R. Cas. N. S. 279; *Goodwin v. Boston, etc., R. Co.*, 84 Me. 203, 24 Atl. 816; *Hickey v. Boston, etc., R. Co.*, 14 Allen (Mass.) 429; *Worthington v. Central Vermont R. Co.*, 64 Vt. 107, 23 Atl. 590, 45 Alb. L. J. 299, 15

L. R. A. 326, 52 Am. & Eng. R. Cas. 384.

20. *Blitch v. Central R. Co.*, 76 Ga. 333; *Ohio, etc., R. Co. v. Allender*, 47 Ill. App. 484; *Lindsey v. Chicago, etc., R. Co.*, 64 Iowa, 407.

21. *Granville v. Manhattan R. Co.*, 105 N. Y. 525, 59 Am. Rep. 516, 34 Am. & Eng. R. Cas. 375; *Louisville, etc., R. Co. v. Bisch*, 120 Ind. 549; *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 58 Am. & Eng. R. Cas. 337.

22. *Higgins v. New York, etc., R. Co.*, 2 Bosw. (N. Y.) 132; *Mitchell v.*

is about to be started,<sup>23</sup> or the cars to be switched,<sup>24</sup> or coupled,<sup>25</sup> or when there is room and unoccupied seats within the car.<sup>26</sup> But when there are no vacant seats within the car, the New York and Illinois courts have established the rule that the passenger is not guilty of contributory negligence, either under the statute or independently of statute, for riding on the platform, steps or running board of a car while the train or car is in motion.<sup>27</sup> But the courts of other States maintain the rule that the passenger is guilty of contributory negligence for so riding, where there are no unoccupied seats in the car, unless it is shown that there was no standing room in the car.<sup>28</sup> But standing or riding on the platform or steps of a steam railroad car is generally held not to be contributory negligence *per se*, but to be ordinarily a question for the jury under all the circumstances of the case.<sup>29</sup> The law of

Southern Pac. R. Co., 87 Cal. 62; Alabama G. S. R. Co. v. Hawk, 72 Ala. 112, 47 Am. Rep. 403, 18 Am. & Eng. R. Cas. 194; Zemp v. Wilmington, etc., R. Co., 9 Rich. L. (S. C.) 84, 64 Am. Dec. 763.

23. Rockford, etc., R. Co. v. Coultas, 67 Ill. 398; Torrey v. Boston, etc., R. Co., 147 Mass. 412; Malcolm v. Richmond, etc., R. Co., 106 N. C. 63.

24. Smotherman v. St. Louis, etc., R. Co., 29 Mo. App. 265.

25. De Mahy v. Morgan's Louisiana R., etc., Co., 45 La. Ann. 1329, 58 Am. & Eng. R. Cas. 448.

26. Goodrich v. Pennsylvania, etc., Canal, etc., Co., 29 Hun (N. Y.) 50; Memphis, etc., R. Co. v. Salinger, 46 Ark. 628; Kentucky, etc., Bridge Co. v. Quinkert, 2 Ind. App. 244, 23 N. E. 338.

27. Werle v. Long Island R. Co., 98 N. Y. 650, 21 Am. & Eng. R. Cas. 429; Willis v. Long Island R. Co., 34

N. Y. 675; Morris v. Eighth Ave. R. Co., 68 Hun (N. Y.) 39, 22 N. Y. Supp. 666; Bruno v. Brooklyn City R. Co., 5 Misc. Rep. (N. Y.) 327, 25 N. Y. Supp. 507; North Chicago St. R. Co. v. Cotton, 140 Ill. 486, 52 Am. & Eng. R. Cas. 238. But it is the duty of the passenger to seek a seat when other passengers leave the train. Chicago, etc., R. Co. v. Fisher, 141 Ill. 614; Chicago, etc., R. Co. v. Carroll, 5 Ill. App. 201.

28. Rolette v. Great Northern R. Co. (Minn.), 97 N. W. 431; Goodwin v. Boston, etc., R. Co., 84 Me. 203; Oliver v. Louisville, etc., R. Co., 43 La. Ann. 804, 47 Am. & Eng. R. Cas. 576; Camden, etc., R. Co. v. Hooscy, 99 Pa. St. 492, 44 Am. Rep. 120, 6 Am. & Eng. R. Cas. 454; Worthington v. Central Vermont R. Co., 64 Bt. 107, 52 Am. & Eng. R. Cas. 384.

29. Werle v. Long Island R. Co., 98 N. Y. 650; Merwin v. Manhattan R. Co., 48 Hun (N. Y.) 608, 1 N. Y.

negligence governing the standing on a platform of an interurban electric car outside of a city is the same as in case of steam cars, and where a rule prohibits passengers from standing on the platform, and on request they refuse to enter the car, there being vacant seats, they remain on the platform at their own risk.<sup>30</sup>

It is not contributory negligence *per se* for a passenger on a street car to ride on the platform, running board, or steps of the car, in the absence of special circumstances, showing it to be such.<sup>31</sup> The rule applicable to street railroad cars is different from

Supp. 267; Augusta Southern R. Co. v. Snider, 118 Ga. 146, 44 S. E. 1005; Mitchell v. Southern Pac. R. Co., 87 Cal. 62; Chicago, etc., R. Co. v. Fisher, 141 Ill. 614; Gerstle v. Union Pac. R. Co., 23 Mo. App. 361; Zemp v. Wilmington, etc., R. Co., 9 Rich. L. (S. C.) 84, 64 Am. Dec. 763; Woods v. Southern Pac. R. Co., 9 Utah 146.

30. Cincinnati, etc., R. Co. v. Lohe (Ohio), 67 N. E. 161.

31. North Chicago St. Ry. Co. v. Baur, 179 Ill. 126, 53 N. E. 568, 45 L. R. A. 108; Brainard v. Nassau Elec. R. Co., 44 App. Div. (N. Y.) 613, 61 N. Y. Supp. 74; Scott v. Bergen Co. Tract Co., 63 N. J. L. 407, 48 Atl. 113; West Chicago St. R. Co. v. Marks, 82 Ill. App. 185, affd. 182 Ill. 15, 55 N. E. 67; Pray v. Omaha St. Ry. Co., 5 Am. Electl. Cas. 407, 44 Nebr. 167, 62 N. W. 447, 11 Am. R. Corp. Rep. 522, 48 Am. St. Rep. 717; North Chicago St. Ry. Co. v. Williams, 140 Ill. 275, 29 N. E. 672, affg. 40 Ill. App. 590; Watson v. Portland, etc., R. Co., 91 Me. 584, 40 Atl. 699, 44 L. R. A. 157; Upham v. Detroit Citizens R. Co., 85 Mich. 12, 12 L. R. A. 129, 48 N. W. 190; Sandford v. Hestonville, etc., R. Co., 136 Pa.

St. 84, 26 N. W. C. 401, 20 Atl. 799; Harbinson v. Metropolitan R. Co., 24 Wash. L. Rep. 438, 9 App. D. C. 60; Doolittle v. Southern Ry. Co., 62 S. C. 130, 40 S. E. 133; Geitz v. Milwaukee City R. Co., 72 Wis. 307, 39 N. W. 866; Willmott v. Corrigan Con-ol. St. R. Co., 106 Mo. 534, 17 S. W. 490; Townsend v. Binghamton R. Co., 57 App. Div. (N. Y.) 234, 58 N. Y. Supp. 121; McGrath v. Brooklyn, etc., R. Co., 5 Am. Electl. Cas. 422, 87 Hun (N. Y.), 310; Marion St. Ry. Co. v. Shaffer, 4 Am. Electl. Cas. 458, 9 Ind. App. 486, 36 N. E. 861; Bailey v. Tacoma Tract Co., 16 Wash. 48, 47 Pac. 241; Adams v. Washington & G. R. Co., 9 App. D. C. 25, 24 Wash. L. Rep. 364; Dillon v. Forty-second St., etc., R. Co., 28 App. Div. (N. Y.) 404, 51 N. Y. Supp. 145; Cumming v. Worcester L. & S. St. Ry. Co., 166 Mass. 220, 44 N. E. 125; Hassen v. Nassau Elec. Ry. Co., 34 App. Div. (N. Y.) 71, 53 N. Y. Supp. 1069; Muldoon v. Seattle City R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794; Augusta, etc., R. Co., v. Renz, 55 Ga. 126; Seigel v. Eisen, 41 Cal. 109; Meesel v. Lynn, etc., R. Co., 8 Allen (Mass.) 234; Nolan v. Brooklyn City, etc., R. Co., 87 N. Y. 63, 41

that applied to a train drawn by steam power. It is well known that street railroad companies whose cars are propelled by electricity constantly expect and invite passengers to ride upon the platforms of their cars when there is no room inside, and that persons having occasion to use such cars are often glad for even a foothold upon the platform, step or footboard. Neither the carrier nor the public have regarded the street car platform as a known place of danger, and the courts have, therefore, held that a passenger who rides thereon is not guilty of such contributory

Am. Rep. 345; *Maier v. Central Park, etc., R. Co.*, 39 N. Y. Super. Ct. 155; *Zemp v. Wilmington, etc., R. Co.*, 9 Rich. (S. C.) 84, 64 Am. Dec. 763; *Hastings v. Central Crosstown R. Co.*, 7 App. Div. N. Y. 312, 40 N. Y. Supp. 93; *Archer v. Fort Wayne, etc., R. Co.*, 87 Mich. 101, 48 Am. & Eng. Cas. 50; *Thirteenth, etc., St. Pass. R. Co. v. Boudrou*, 92 Pa. St. 475, 2 Am. & Eng. R. Cas. 30, 37 Am. Rep. 707, where a passenger riding on the rear platform of a car, leaning back against the dasher, was struck and injured by the pole of a following car, he was allowed to recover. In such case, "his position was a condition, but not a cause of his injury. It neither lessened the speed of the car he was on or increased that of the other; his presence was not the cause of the broken chain and reckless driving of the rear car; his place was an incident of an overcrowded car, whose conductor had left the platform to give him standing room, and had not given him a seat or requested him to enter the car."

The rule is true even where there is plenty of room inside; *Maguire v. Middlesex R. Co.*, 115 Mass. 239, where plaintiff was intoxicated:

*Burns v. Bellefontaine, etc., R. Co.*, 50 Mo. 139, where plaintiff was a free passenger; *Nolan v. Brooklyn City, etc., R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345, where plaintiff went out on platform to smoke; *Matz v. St. Paul City R. Co. (Minn.)*, 53 N. W. 1071; *Brusch v. St. Paul City R. Co. (Minn.)* 55 N. W. 57. Compare *Ashbrook v. Frederick Ave. R. Co.*, 18 Mo. App. 290; *Downey v. Hendrick*, 46 Mich. 498; *Chicago W. D. Ry. Co. v. Klauber*, 9 Ill. App. 613.

In Missouri it was held that it was error to instruct the jury that if the plaintiff was riding on the footboard of a grip car when it was running at its usual speed, he was guilty of contributory negligence, unless he was a passenger, since his status as a passenger cannot affect the question of his negligence. *Raming v. Metropolitan St. Ry. Co.*, 157 Mo. 477, 57 S. W. 268. The passenger's negligence in riding on the platform will not prevent a recovery for his death, if the injuries could have been inflicted upon him in the same manner had he ridden elsewhere upon the car. *Birmingham Ry. & E. Co. v. James*, 121 Ala. 120, 25 So. 847.



negligence, as a matter of law, as will prevent his recovery for an injury sustained through the fault of an employe of the company. It is a circumstance, however, to be submitted to and determined by the jury.<sup>32</sup> The question of contributory negligence under the particular circumstances of a case is one to be submitted to the jury, whenever there is reasonable doubt.<sup>33</sup> It cannot be said to be negligence as a matter of law, under all circumstances, for the carrier of passengers to permit a passenger to stand upon the running board; but if no seat is furnished and the carrier permit a passenger to ride in that way, the carrier assumes the duty of exercising the care demanded by the circumstances.<sup>34</sup> It is not contributory negligence, as a matter of law, to stand on the step along the side of an open car if the car is crowded.<sup>35</sup> But a pas-

**32.** *Watson v. Portland & C. E. Ry. Co.*, 91 Me. 584, 40 Atl. 699, 64 Am. St. Rep. 268, 44 L. R. A. 157; *Seller v. Market St. Ry. Co.*, 1 St. Ry. Rep. 8, (Cal.) 72 Pac. 1006; *Purington-Kimball Brick Co. v. Eckman*, 102 Ill. App. 183.

**33.** *Meesel v. Lynn & B. R. Co.*, 8 Allen (Mass.) 234; *City R. Co. v. Lee*, 50 N. J. L. 438, 34 Am. & Eng. R. Cas. 568; *Topeka City R. Co. v. Higgs*, 38 Kan. 389, 34 Am. & Eng. R. Cas. 544; *Flick v. Union R. Co.*, 134 Mass. 481, 16 Am. & Eng. R. Cas. 372; *Huelsenkamp v. Citizens' R. Co.*, 34 Mo. 45, 37 Mo. 537, 90 Am. Dec. 399; *Burns v. Bellefontaine, etc., R. Co.*, 50 Mo. 139; *Germantown Pass. R. Co. v. Walling*, 97 Pa. St. 55, 2 Am. & Eng. R. Cas. 20, 37 Am. Rep. 796; *Geitz v. Milwaukee City R. Co.*, 72 Wis. 307.

**34.** *North Chicago St. Ry. Co. v. Polkey*, 1 St. Ry. Rep. 94, 203 Ill. 225, 67 N. E. 793; *North Chicago St. Ry. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672, affg. 40 Ill. App. 590.

**35.** *Bruno v. Brooklyn City R. Co.*, 5 Misc. Rep. (N. Y.) 327, 25 N. Y. Supp. 507; *Cummings v. Worcester, etc., St. R. Co.*, 166 Mass. 220, 44 N. E. 126; *Wilde v. Lynn & B. R. Co.*, 163 Mass. 533, 40 N. E. 851, where plaintiff rode on the footboard of a crowded car without objection on the part of those having charge of the car, it was held proper to submit the question of his contributory negligence to the jury.

Where a boy of sixteen years was a passenger on a crowded train, whereby he was compelled to stand on the platform, and leaned out slightly, when his head came in contact with an iron post and he was killed, he was guilty of such contributory negligence as to prevent his recovery. Though a carrier of passengers must provide a safe place within its cars for its passengers to ride, yet, when such duty has been performed, a passenger has no right to extend his person beyond the line of the car or ride on the platform thereof. *Benedict v.*

senger occupying such a position must exercise reasonable care in looking out for and protecting himself against vehicles of travel met or overtaken by the car, and objects along the track, and he has a right to assume in taking such a position by the invitation or consent of the company, that the company will exercise some degree of care to avoid doing anything that might injure him, and it is the legal duty of the company so to do.<sup>36</sup> The seats in street cars are provided for passengers to occupy, and if there is room to be seated inside the car and no special reason exists why the passenger should not occupy it, he is negligent as a matter of law, in remaining on the platform, and, if without reasonable cause, he leaves the car or places himself on the outside of it while in motion, he assumes the hazard of so doing.<sup>37</sup> The cause which may justify a passenger, without the imputation of fault on his part, as against the carrier, in leaving his seat and going outside the car,

Minneapolis & St. P. R. Co., 90 N. W. 360, 86 Minn. 224, 57 L. R. A. 639. A passenger standing on the side steps of an open street car, when there is room inside, assumes the risk, so that there can be no recovery for his being struck by a pole supporting the electric wires. *Woodroffe v. Roxborough, etc., Ry. Co.*, 201 Pa. 521, 51 Atl. 394.

36. *Seller v. Market St. Ry. Co.*, 1 St. Ry. Rep. 9, (Cal.) 72 Pac. 1006; *Bumbear v. United Tract. Co.*, 198 Pa. 198, 47 Atl. 961; *Moser v. South Covington & C. St. Ry. Co.*, 1 St. Ry. Rep. 240, 25 Ky. L. Rep. 154, 74 S. W. 1090; *Gelley v. New Orleans City & L. R. Co.*, 49 La. Ann. 588, 21 So. 851. See also *Padgitt v. Moll*, 159 Mo. 143, 60 S. W. 121, case of news-boy boarding the car to sell papers.

37. *Thane v. Scranton Tract. Co.*, 191 Pa. 249, 43 Atl. 136, 6 Am. Neg. Rep. 185, 4 Chic. L. J. Wkly. 260; *Bradley v. Second Ave. R. Co.*, 90

*Hun (N. Y.)* 419, 70 St. Rep. (N. Y.) 622, 35 N. Y. Supp. 918; *Coleman v. Second Ave. R. Co.*, 114 N. Y. 612, 21 N. E. 1064; *Mann v. Philadelphia Tract. Co.*, 175 Pa. St. 122, 34 Atl. 572; *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495; *Guina v. Second Ave. R. Co.*, 67 N. Y. 596; *Dixon v. Brooklyn City & N. R. Co.*, 100 N. Y. 171; *Todd v. Old Colony, etc., R. Co.*, 3 Allen (Mass.) 18, 80 Am. Dec. 49, 7 Allen (Mass.) 207, 83 Am. Dec. 679; *Hickey v. Boston, etc., R. Co.*, 14 Allen (Mass.) 429; *Torrey v. Boston, etc., R. Co.*, 147 Mass. 412; *Pittsburgh, etc., R. Co. v. McClurg*, 56 Pa. St. 294; *Indianapolis, etc., R. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 336; *Pittsburgh, etc., R. Co. v. Andrews*, 39 Md. 329, 17 Am. Rep. 568; *Dun v. Seaboard, etc., R. Co.*, 78 Va. 645, 49 Am. Rep. 388; *Moody v. Springfield St. Ry. Co. (Mass.)*, 65 N. E. 29.

and occupying temporarily or otherwise, a position there while in motion, must be dependent upon the occasion and circumstances which induce or impel him to do so, as, for example, where it becomes necessary for his comfort because of the crowded condition of the car, to do so.<sup>38</sup> If a passenger is unnecessarily and voluntarily in a place of danger, his negligence is presumed, and puts the burden of proof upon the plaintiff to show that his riding in that position did not contribute to his injury.<sup>39</sup>

It is the duty of a passenger to go inside the car or train, if there is standing room inside, although there are no vacant seats. The fact that the passenger has a well founded ground of complaint against the company for not providing adequate accommodations does not release him from the duty of leaving the platform and entering the car.<sup>40</sup> If the car is so crowded that there is no room except upon the platform, and the conductor stops and allows the passenger to get on, the presumption of the passenger's negligence does not exist; the company must assume all risks where it requires its passengers to ride in such a place; nor can negligence be imputed to a passenger who boards a car under such circumstances.<sup>41</sup>

38. Coleman case, *supra*; Wood v. Brooklyn City R. Co., 5 App. Div. (N. Y.) 492; Tanner v. Buffalo Ry. Co., 72 Hun (N. Y.) 465; Martin v. Second Ave. R. Co., 3 App. Div. (N. Y.) 448, 38 N. Y. Supp. 220.

39. Solomon v. Central Park, etc., R. Co., 31 N. Y. Super Ct. 138; Bradley v. Second Ave. R. Co., 90 Hun (N. Y.) 419, 35 N. Y. Supp. 918; Ward v. Central Park, etc., R. Co., 11 Abb. Pr. N. S. (N. Y.) 411, 42 How. Pr. (N. Y.) 289; Willis v. Lynn, etc., R. Co., 129 Mass. 351, 2 Am. & Eng. R. Cas. 27, where a passenger was riding on the platform in spite of a rule of the company and the driver's warning; Downey v. Hendrie, 46 Mich. 468, 41 Am. Rep. 177, such rid-

ing bars recovery where there is room inside, even when it is done at the invitation of the driver. Archer v. Fort Wayne, etc., R. Co., 87 Mich. 101, 48 Am. & Eng. R. Cas. 50; Maguire v. Middlesex R. Co., 115 Mass. 239; Butler v. Pittsburgh, etc., R. Co., 139 Pa. St. 195; Ashbrook v. Frederick Ave. R. Co., 18 Mo. App. 290.

40. Graville v. Manhattan R. Co., 105 N. Y. 525, 34 Am. & Eng. R. Cas. 375, 59 Am. Rep. 516, as to whether the brakeman or conductor might in such a case force the passenger to enter the car is a question which the courts have not as yet determined.

41. Sheridan v. Brooklyn, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490;

One riding on the platform of a street car, at the invitation of the conductor as a passenger without hire, and injured without fault on his part through the negligence of the driver in the course of his employment, may recover of the company.<sup>42</sup> Likewise one who is riding there without objection on the part of the conductor, there being no notice or warning prohibiting such riding.<sup>43</sup> A passenger may go out of the car as it approaches his destination, and he is not necessarily negligent in preparing to leave the car. He has no right to leave the car to jump from it while in motion, but he has a perfect and unquestionable right to prepare to leave after

Werle v. Long Island R. Co., 98 N. Y. 650, 21 Am. & Eng. R. Cas. 429; Wilis v. Long Island R. Co., 34 N. Y. 670, affg. 32 Barb. (N. Y.) 398; Clark v. Eighth Ave. R. Co., 36 N. Y. 135, 93 Am. Dec. 495; Guina v. Second Ave. R. Co., 8 Hun (N. Y.) 494, affd. 67 N. Y. 596, passenger not negligent in failing to take hold of handrail; Thirteenth St., etc., Pass. R. Co. v. Boudrou, 92 Pa. St. 475, 2 Am. & Eng. R. Cas. 30, 37 Am. Dec. 707; West Phila. Pass. R. Co. v. Gallagher, 108 Pa. St. 524, 27 Am. & Eng. R. Cas. 201; Germantown Pass. R. Co. v. Walling, 97 Pa. St. 55, 2 Am. & Eng. R. Cas. 20, 39 Am. Rep. 796; Walling v. Railway Co., 12 Phila. (Pa.) 309; People's Pass. R. Co. v. Green, 56 Md. 84, 6 Am. & Eng. R. Cas. 168; Topeka City R. Co. v. Higgs, 38 Kans. 375, 34 Am. & Eng. R. Cas. 529, passenger riding on side-board of the car; Geitz v. Milwaukee City R. Co., 72 Wis. 307; City R. Co. v. Lee, 50 N. J. L. 435, 34 Am. & Eng. R. Cas. 566, riding on running board; Lapointe v. Middlesex R. Co., 144 Mass. 18, 28 Am. & Eng. R. Cas. 193, woman injured while standing inside, there being no vacant seats.

Gatens v. Metropolitan St. Ry. Co., 85 N. Y. Supp. 967, where a crowded car was driven around a curve without slackening speed, in violation of a rule of the company, the company was liable.

42. Wilton v. Middlesex R. Co., 107 Mass. 108; Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 468. But one directed by the conductor to ride on the front platform, who is injured by being kicked by one of the horses after it had fallen and efforts were being made to release it, was held not entitled to recover, as the driver's negligence was not the proximate cause of the accident. Roe-decker v. Metropolitan St. R. Co., 87 App. Div. (N. Y.) 227, 84 N. Y. Supp. 300.

43. Nolan v. Brooklyn City, etc., R. Co., 87 N. Y. 63, 41 Am. Rep. 345; Day v. Brooklyn City R. Co., 12 Hun (N. Y.) 435; East Saginaw City R. Co. v. Bohn, 27 Mich. 503, 33 Mich. 259; Brennan v. Fair Haven, etc., R. Co., 45 Conn. 284; Pittsburgh, etc., Pass. Co. v. Caldwell, 74 Pa. St. 421; Phila. City Pass. R. Co. v. Hassard, 75 Pa. St. 367.

notice given, and particularly after he has received intimations from the company's servants that his notice is understood. There is no rule of law which requires him to keep his seat until the very moment that the car has actually stopped. He has a right to start to leave when he has notified the driver or conductor, and unless he is careless and negligent in so doing he is not guilty of contributory negligence, and does not lose his right to recover damages for an injury received through the negligence of the carrier.<sup>44</sup> But, if he thus voluntarily places himself upon the platform or steps of the car while it is in motion and is thrown off by the increase of the speed of the car, which happens before he has indicated to any one of the agents of the company that he intends to alight, such an increase of speed, unaccompanied by any other fact, cannot be the foundation of a charge against the company of negligence.<sup>45</sup>

A passenger is not necessarily negligent, if, under the direction of the conductor of the rear car, he attempts to go to the rear car just as the train starts, but he is not justified

44. *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131, 97 Am. Dec. 780; *Losee v. Watervliet Turnp., etc., R. Co.*, 63 Hun (N. Y.) 404; *Colwell v. Manhattan R. Co.*, 57 Hun (N. Y.) 542; *Fleck v. Union R. Co.*, 134 Mass. 480, 16 Am. & Eng. R. Cas. 372; *North Chicago St. R. Co. v. Baur*, 179 Ill. 126, 53 N. E. 568. 45 L. R. A. 108, where passenger about to alight stood on the platform with his back against the dashboard, and by a sudden jerk of the car was thrown into the street; *Conner v. Citizens St. Ry. Co.*, 105 Ind. 62, 55 Am. Rep. 177; *Wylde v. Northern R. of N. J.*, 53 N. Y. 156; *Poulin v. Broadway, etc., Ry. Co.*, 61 N. Y. 621; *Morrison v. Erie Ry. Co.*, 56 N. Y. 310.

45. *Sims v. Metropolitan St. R.*

*Co.*, 65 App. Div. (N. Y.) 270, 72 N. Y. Supp. 835. A passenger on an electric street car, leaving his seat and stepping on to the running board of the car while in motion, assumes the risk of his position. *Bainbridge v. Union Tract. Co.*, 206 Pa. St. 71, 55 Atl. 836. Where plaintiff elected to ride on the step of a crowded street car and was thrown off by the oscillation or "greyhound motion" of the car as it was running at the usual rate of speed, and there was no evidence of any unusual or abnormal motion due to any unusual condition of the car, rails, roadbed, or management, plaintiff assumed the risk of an injury so occasioned. *Moskowitz v. Brooklyn H. R. Co.*, 85 N. Y. 960.

in attempting to pass from one footboard to another while the train is in motion;<sup>46</sup> and he is guilty of contributory negligence in riding upon the rear platform when there is ample standing room inside the car in which there are straps unto which he may cling while standing, if an injury result to him, which would not have occurred had he been inside the car.<sup>47</sup> But a woman's want of reasonable care in getting upon a crowded street car and attempting to ride upon the platform because she is unable to get inside the car, will not relieve the street car company from liability for injuries due to her being thrown from the platform, if, knowing her situation and consequent exposure to danger, it might, by the exercise of reasonable care, under the circumstances, have prevented injury to her.<sup>48</sup> Where it is customary for the passengers, with the consent of the carrier to use the running board of an open street car, not only as a means of ingress and egress, but also to pass from one part of the car to another, the question of negligence in case of accident cannot be properly answered without considering this circumstance. Standing upon the running board, the passenger must take reasonable care to avoid accident, and it cannot certainly be said that the carrier is negligent in permitting the passenger to use the running board as a standing place; the question of the carrier's negligence and of the passenger's contributory negligence, are, therefore, for the jury.<sup>49</sup> The fact that

46. *Eichof v. Chicago, N. S. R. Co.*, 74 Ill. App. 196.

47. *Ward v. Central Park R. Co.*, 11 Abb. Pr. N. S. (N. Y.) 411; *Aikin v. Frankford, etc., R. Co.*, 142 Pa. St. 47, 21 Atl. 781; *Andrews v. Capital City, etc., R. Co.*, 2 Mackay (D. C.) 137.

48. *Metropolitan St. R. Co. v. Shashall* (D. C. App.), 22 Wash. L. Rep. 377.

49. *Citizens St. R. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54, citing *Cogswell v. West Side, etc., R. Co.*, 5

Wash. 46, 31 Pac. 411; *Railway Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Railway Co. v. Rude*, 62 Ill. App. 550; *Railroad Co. v. Cook*, 145 Ill. 551, 33 N. E. 958; *Elliott v. Newport, etc., R. Co.*, 18 R. I. 707, 28 Atl. 331, 31 Atl. 694, 23 L. R. A. 208; *Railway Co. v. McCleave* (Ky.), 38 S. W. 1055; *Topeka City R. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667; *Spellman v. Lincoln Transit Co.*, 36 Neb. 890, 55 N. W. 270, 22 L. R. A. 316; *McLean v. Burbank*, 11 Minn. 277; *Dahl v. Railway Co.*, 62 Wis. 655, 22 N. W. 755;

a passenger on a cable car is standing on the running board where passengers are accustomed to ride does not, however, absolve the railroad company from its duty toward him as a passenger, although his position may be unsafe;<sup>50</sup> and a street railway company is not, as matter of law, free from negligence in permitting a passenger, without warning, to stand on the footboard at the side of a car while crossing a viaduct on which are posts so near as to strike one riding on such footboard, unless he inclines his body toward the car;<sup>51</sup> or where the conductor of an open car did not stop it although he knew a passing truck on the street was dangerously close, and that the plaintiff, a passenger, was on the side step of the car.<sup>52</sup> Courts will not draw distinctions between footboards and seats upon a street car as places of relative danger and safety, in view of the general custom of street car carriers of persons.<sup>53</sup> If a street railway be built along a causeway which necessitated placing trolley poles near the track, and the plaintiff who had knowledge of the situation, be riding on the footboard next to the trolley poles and refuses to step on the platform at the invitation of the conductor, but leans back to allow him to pass by, and thereby his head is brought in contact with a trolley pole, he is guilty of contributory negligence.<sup>54</sup> A passenger upon a

Watkins v. El. Co. (Ala.), 24 So. 392, 43 L. R. A. 297.

50. Sweeney v. Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682.

51. West Chicago St. R. Co. v. Marks, 82 Ill. App. 185, affd. 182 Ill. 15, 55 N. E. 67.

52. Faris v. Brooklyn City & N. R. Co., 46 App. Div. (N. Y.) 231, 61 N. Y. Supp. 670.

53. West Chicago St. R. Co. v. Meyer, 69 Ill. App. 625; Lake v. Cincinnati Inc. P. R. Co., 13 Ohio C. C. 494; East Omaha St. R. Co. v. Godola, 50 Nebr. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas. N. S. 300; Cleveland

etc., R. Co. v. Moneyhun, 146 Ind. 147, 34 L. R. A. 141, 44 N. E. 1106, 5 Am. & Eng. R. Cas. N. S. 632.

54. Nugent v. Fair Haven & W. St. Ry. Co., 73 Conn. 139, 46 Atl. 875. And see Caspers v. Dry Dock, etc., R. Co., 22 App. Div. (N. Y.) 156, 47 N. Y. Supp. 961; Brooman v. Houston, etc., R. Co., 7 Misc. Rep. (N. Y.) 234, 58 St. Rep. (N. Y.) 23, 27 N. Y. Supp. 287; Tanner v. Buffalo R. Co., 72 Hun (N. Y.) 465, 54 St. Rep. (N. Y.) 776, 25 N. Y. Supp. 242; Littman v. Dry Dock, etc., R. Co., 6 Misc. Rep. (N. Y.) 34, 55 St. Rep. (N. Y.) 514, 25 N. Y. Supp. 1002;

cable street railway is not guilty of negligence in taking a seat provided for passengers upon the outside of the grip car instead of on the inside of the trailer.<sup>55</sup> The provisions of the New York Railroad Law that "in case any passenger on any railroad shall be injured while on the platform of a car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury; provided said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of the passengers" do not apply to street railroad companies.<sup>56</sup>

A passenger, who, without negligence, stands upon the running board of a street car assumes the ordinary risks, but not exceptional risks, arising from collisions.<sup>57</sup> Except under special circum-

*Pomaski v. Grant*, 119 Mich. 657, 78 N. W. 891, 6 Det. Leg. N. 43; *Malpass v. Hestonville, etc.*, R. Co., 129 Pa. St. 599, 42 Atl. 291, 5 Am. Neg. Rep. 471.

55. *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021.

56. *Vail v. Broadway R. Co.*, 147 N. Y. 377, 70 St. Rep. (N. Y.) 33, "In the very nature of things," said the court in its opinion, "a provision of this character, intended primarily to prevent accidents and injuries to passengers on trains operated by steam and running at a high rate of speed, is not applicable to a street railroad, the cars of which are drawn through city streets at the rate of a few miles an hour. The danger to passengers standing upon the platforms of steam cars when in motion is great and obvious, while that of passengers on the platforms of street cars is almost nothing, as is fully demonstrated by the practice of the general public and the companies

themselves." (p. 381.) *Lax v. Forty-Second St., etc.*, R. Co., 16 N. Y. Super. Ct. 448; *Hayes v. Forty-Second St., etc.*, R. Co., 97 N. Y. 259.

57. *Ward v. International Ry. Co.*, 206 N. Y. 83, 99 N. E. 262, rev'g judg. 125 N. Y. Supp. 1149, 140 App. Div. 938.

A street car passenger riding upon the running board must exercise a care reasonable and commensurate with the danger of his position to shield himself from the results even of exceptional risks; and when he remains upon the running board after he could have found and taken a seat by the exercise of reasonable vigilance and effort, he is negligent. *Id.*

Where the speed of a street car, running at 10 or 12 miles an hour as it struck a curve in the track, did not endanger the safety of passengers remaining in the seats provided for them, the act of a passenger in getting on the running board, when the car maintained that speed before and



stances, a passenger is negligent if he goes upon the platform of a coach while the train is traveling between stations, and, if he is injured because of his presence on the platform while the train is running, the carrier is not liable.<sup>58</sup> Where plaintiff was injured while on the steps of a car as he was endeavoring to alight, that he might have ridden inside of the car is immaterial.<sup>59</sup> A person, injured while riding on the uninclosed platform of a railroad train or other exposed position, assumes the risk of injury from such cause.<sup>60</sup> Under the California Civ. Code, §§ 483, 484, requiring railroads to furnish sufficient accommodations within its cars for all passengers, and relieving railroads from liability for injuries to passengers while riding on the platform of the cars in violation of posted rules, a passenger who in violation of posted rules voluntarily goes on the platform of a car solely to ride there, though accommodations are provided for him in the car, may not recover for an injury received while riding there.<sup>61</sup> Where a street car passenger unnecessarily stands on the platform or steps in a dangerous position while the car is in motion, and because of so doing is thrown off and injured, he is guilty of negligence, precluding recovery.<sup>62</sup> A street railway company cannot create and permit a custom of hauling passengers on the platform of its cars, and escape liability for accidents occurring through the operation of its cars with relation to such passengers.<sup>63</sup> That plaintiff was riding

as it struck the curve, the existence of which he knew, was negligence as a matter of law, precluding a recovery for his injuries by being thrown from the car. *Maereker v. Brooklyn Heights R. Co.*, 122 N. Y. Supp. 87, 137 App. Div. 49.

58. *Savage v. Illinois Cent. R. Co.*, 154 Ill. App. 634.

59. *Elliott v. Seattle, etc., Ry. Co.*, 68 Wash. 129, 122 Pac. 614.

60. *Renaud v. New York, etc., R. Co.*, 210 Mass. 553, 97 N. E. 98.

61. *Pruitt v. San Pedro, etc., R. Co.*, 161 Cal. 29, 118 Pac. 223.

62. *File v. Wilmington City Ry. Co.* (Del. Super.), 80 Atl. 623.

63. *Hart v. Capital Traction Co.*, 36 App. D. C. 502.

While it is not negligence *per se* for a passenger on a street railway car to ride on the front platform, although there are vacant seats in the car, he assumes the additional risk resulting therefrom in the ordinary course of things, when the car is

on the running board of a street car when negligently injured does not necessarily preclude recovery by him.<sup>64</sup> That rules of a street railway company provide that passengers may stand on the platform only when there are no seats in the car will not preclude a passenger from recovering damages for negligence of the car crew because there were seats in the car, and the passenger was riding on the platform with the sanction of the employes of the company.<sup>65</sup> Notwithstanding a printed request that passengers shall not ride in the front vestibule of a car, yet it is not contributory negligence for a passenger so to do if the car is otherwise crowded and his fare is collected by the conductor in the presence of the general manager of the road, and no objections made to his riding in such front vestibule.<sup>66</sup>

Except under special circumstances, it is negligence for a passenger to stand on the platform of a car of a rapidly moving train;<sup>67</sup> but if the train is so crowded that one cannot reasonably enter a car it is not negligence to ride on the platform, nor if the carrier acquiesce in the use of such accommodations by collecting fare for the same, or by some other indicative act.<sup>68</sup> In an action for the death of a passenger who fell through the door of an open vestibule on the car in which he was riding, the mere fact that the danger was apparent or that he knew of it is not of itself sufficient to authorize a verdict for defendant on the score of contributory

properly managed. *Sullivan v. Capital Traction Co.*, 34 App. D. C. 358.

See also, *Capital Traction Co. v. Brown*, 39 App. D. C. 473.

64. *Twiss v. Boston Elev. Ry. Co.*, 208 Mass. 108, 94 N. E. 253.

Where plaintiff had been employed by the defendant as a conductor, and was familiar with the conditions of a narrow street, through which the cars ran, it was negligence for him to stand upon the running board of the car in such a manner that he could be struck by the pole of a cart stand-

ing between the curb and the track. *Heshion v. Boston Elevated Ry. Co.*, 208 Mass. 117, 94 N. E. 390.

65. *McMahon v. New Orleans Ry., etc., Co.*, 127 La. 544, 53 So. 857.

66. *Cleary v. Bloomington, etc., Elec. Ry. Co.*, 150 Ill. App. 418.

67. *Clanton v. Southern Ry. Co.*, 165 Ala. 485, 51 So. 616; *Norvell v. Kanawha & M. Ry. Co.*, 67 W. Va. 467, 68 S. E. 288.

68. *Norvell v. Kanawha & M. Ry. Co.*, *supra*; *Yazoo & M. V. R. Co. v. Byrd*, 89 Miss. 308, 42 So. 286.

negligence, unless he omitted to conduct himself with that degree of care usually exercised by an ordinarily prudent person in the same circumstances.<sup>69</sup> That a passenger, in leaving a car, had stepped with one foot on the platform while the other remained in the doorway when he was injured, did not present a case of action for injury while "riding on the platform," within the Indiana statute (Burns Ann. St. 1908, § 5316), relieving the carrier from liability for injury to a passenger on the platform in violation of the printed regulations of the company posted in a conspicuous place inside the car.<sup>70</sup> Where a street car is crowded, and there are no vacant seats, standing on the footboard is not, of itself, negligence on the part of a passenger.<sup>71</sup> A passenger riding on the running board of a car has the right to assume that during transit the carrier will not expose him to the peril of injury from passing vehicles, if by the exercise of reasonable diligence the movements of the car can be so controlled as to avoid collision with them.<sup>72</sup> Where it was the custom to permit passengers to stand on the rear platform of cars which were closed with gates apparently securely closed and fastened, it was not the duty of a passenger so riding to critically examine the fastenings, but only to exercise reasonable care to protect himself from injury, and where he was thrown off and injured by reason of the giving way of the gates he is not chargeable with negligence because he did not take the additional precaution to see and use a handhold.<sup>73</sup> A passenger is not guilty of contributory negligence as matter of law in merely riding on a platform of a vestibuled train, but whether he was guilty of contributory negligence was for the jury.<sup>74</sup>

69. *Johnston v. St. Louis & S. F. R. Co.*, 150 Mo. App. 304, 130 S. W. 413.

70. *Lake Erie & W. R. Co. v. Cotton*, 45 Ind. App. 580, 91 N. E. 253.

71. *Math v. Chicago City Ry. Co.*, 243 Ill. 114, 90 N. E. 235.

72. *Eldredge v. Boston Elev. Ry. Co.*, 203 Mass. 582, 89 N. E. 1041.

73. *Cincinnati Traction Co. v. Leach*, 169 Fed. 549, 95 C. C. A. 47.

74. *Johnson v. Yazoo & M. V. R. Co.*, 94 Miss. 447, 47 So. 785. See also, *Goodloe v. Metropolitan St. Ry. Co.*, 120 Mo. App. 194, 96 S. W. 482, where there was a rule requiring smokers to occupy the rear vestibule.

A street car passenger, who voluntarily takes his stand on the platform or running board of a car, assumes the dangers necessarily incident to such position; but he is not guilty of negligence.<sup>75</sup> But a passenger of experience in riding at such places, thrown from the platform of a street car, while going, to his knowledge, around a loop to the stopping place, is not shown to have been free from contributory negligence; it not appearing that he took any precaution to maintain his position.<sup>76</sup> It is negligence for a passenger to stand upon the platform of a car of a rapidly moving commercial train, except in cases of necessity.<sup>77</sup> A street car passenger is not chargeable with contributory negligence in remaining on the steps from which he is thrown by the negligent operation of the

75. *N. J.*—Nirk v. Jersey City, etc., St. Ry. Co., 75 N. J. L. 642, 68 Atl. 158; Brackner v. Public Service Corp., 77 N. J. L. 1, 71 Atl. 149, but not those arising from causes *ab extra*.

*N. Y.*—Gregory v. Elmira Water, etc., Co., 190 N. Y. 363, 83 N. E. 32, rev'g order 95 N. Y. Supp. 1130, 107 App. Div. 630; Cramer v. Brooklyn Heights R. Co., 190 N. Y. 310, 83 N. E. 35, rev'g judg. Kramer v. Brooklyn Heights R. Co., 100 N. Y. Supp. 276, 114 App. Div. 804.

*Ill.*—Chicago City Ry. Co. v. Schaefer, 121 Ill. App. 334, when it is reasonably practicable for him to take his seat within the car.

*Mo.*—Vessels v. Metropolitan St. Ry. Co., 129 Mo. App. 708, 108 S. W. 578, but he does not assume the risks resulting from the failure of the carrier's servants to observe due care in the management of the car.

*Tex.*—Houston & T. C. Ry. Co. v. Johnson (Tex. Civ. App.), 103 S. W. 239, but he does not assume the risk of a danger created by a careless, unexpected, and negligent act.

*Ark.*—Oliver v. Ft. Smith L. & T. Co., 89 Ark. 222, 116 S. W. 204.

76. Waddy v. Brooklyn Heights R. Co., 140 N. Y. Supp. 824.

Where a passenger on a street car voluntarily placed himself in a position of danger by going onto the platform and then standing on the step, waiting for the car to reach the corner of the street, he was chargeable with contributory negligence. Bachman v. Union Ry. Co. of N. Y. City, 111 N. Y. Supp. 586.

Where plaintiff boarded a horse car and stood on the front platform while the car was being driven rapidly and was bouncing up and down in such a manner that he realized that it was a dangerous position, but made no effort to go inside, where there was plenty of room, he was guilty of contributory negligence, and could not recover for injuries. Kleffman v. Metropolitan St. Ry. Co., 101 N. Y. Supp. 582, 116 App. Div. 334.

77. Alabama G. S. R. Co. v. Gilbert, (Ala.), 60 So. 542.

car, where he is compelled by the crowded condition of the car to either ride there or shove his way to the rear platform.<sup>78</sup> If a passenger voluntarily chooses to ride on the rear platform of a street car, he is to be held to the exercise of a high degree of care to avoid dangers known, or to be reasonably apprehended.<sup>79</sup> A boy passenger riding on the platform and a defective step of a railway car assumed the risk of injury through such step, and the swaying of the train caused by defective track and roadbed, if he knew that the step was defective and that the car was swaying, unless he was insufficiently intelligent to be able to understand the danger of so riding.<sup>80</sup> A passenger who rides on the running board of a summer car, when there is room for him to stand within the body of the car, is guilty of contributory negligence, and if he is thrown from this position by a lurch of the car in passing rapidly around a curve, and killed, no recovery can be had for his death from the railroad company.<sup>81</sup> A passenger seated on the platform of a car with one foot on the bottom step and the other leg straight out, there being seats in the car, is negligent as a matter of law.<sup>82</sup> The causes which may justify a passenger, without the imputation of fault on his part, as against the carrier, in leaving his seat and going outside the car and occupying temporarily a position on the

78. *South Covington & C. St. Ry. Co. v. Hardy* (Ky.), 153 S. W. 474.

79. *Blair v. Lewiston, etc., St. Ry.* (Me.), 85 Atl. 792.

80. *Walling v. Trinity, etc., Ry. Co.* (Tex. Civ. App.), 106 S. W. 417.

81. *Ramsay v. Pottstown & R. St. Ry. Co.*, 35 Pa. Super. Ct. 598.

One riding on the running board of a summer car, outside of a lowered bar is negligent *per se*, and cannot recover for injuries received whether he could have got a safer position or not. *Harding v. Philadelphia R. T. Co.*, 217 Pa. 69, 66 Atl. 151, 10 L. R. A. (N. S.) 352.

A passenger who rides on a side

step of a summer car when it is reasonably practicable for him to go inside the car assumes all the risks of his position, and in all cases he assumes the risk incident to the usual swaying and jolting of the car and from collision with passing vehicles and obstructions of whatever nature which unexpectedly appear. These are dangers which cannot be guarded against by the careful and prudent management of the car. *Wood v. Chester Traction Co.*, 36 Pa. Super. Ct. 483.

82. *Wagner v. Atlantic Coast Line R. Co.*, 147 N. C. 315, 61 S. E. 171.

platform while the cars are standing still, depend on the occasion and circumstances which induce or impel him to do so.<sup>83</sup>

An adult person traveling on a railroad train, who, several blocks before the train reached a station, and while it was moving at a speed of ten miles an hour, voluntarily and without necessity left the car in which he was seated and stood upon the open platform, and while so riding was killed in a collision with another train standing at the station, no passenger in the cars being seriously injured, was chargeable with contributory negligence which precluded a recovery from the company for his death.<sup>84</sup> Where plaintiff boarded a standing street car at night while the car was either standing still or had not moved perceptibly, and was injured by the car being struck by a runaway car from behind, while plaintiff was either in the act of entering or while he had stopped on the platform momentarily with a view to going inside as soon as the car started, or with the intention of remaining on the platform, plaintiff was not negligent, nor did he assume the risk of the collision by being on the platform after having an opportunity to go inside the car.<sup>85</sup> As a matter of law the position of a street car passenger, standing on the outer edge of an open car running twelve miles an hour, is perilous, where the car is brought to a sudden stop by a quick, violent, backward motion.<sup>86</sup> Under Georgia Civ. Code 1895, § 3830, which provides that "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover," a declaration in an action by a passenger against a railroad company to recover for a personal injury does not state a cause of action where it shows that plaintiff was a railroad employe, that while riding as a passenger on defendant's road he went out upon the platform of the car as the train was passing through railroad

83. *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 So. 318.

84. *Chicago G. W. Ry. Co. v. Mohaupt*, 162 Fed. 665, 89 C. C. A. 457, 18 L. R. A. (N. S.) 760.

85. *United Rys., etc., Co. v. Riley*, 109 Ind. 327, 71 Atl. 970.

86. *Richmond St. & I. Ry. Co. v. Beverley*, 43 Ind. App. 105, 85 N. E. 721, rehearing 84 N. E. 558, denied.

yards approaching a station and stood near the step with one hand upon the hand rail, and that he was thrown to the ground by a violent jerk of the train, ordinary care requiring him under such circumstances to remain in the car until the train stopped.<sup>87</sup> Where a passenger on a crowded electric car sat on the floor between the seats with his feet on the running board and fell off while the car was rounding a curve, it was not error to direct a verdict for defendant.<sup>88</sup>

### § 19. Riding with part of person projecting from window.

A passenger on a railway train is not guilty of negligence in sitting by an open window.<sup>89</sup> It has been held in most of the reported cases, contributory negligence *per se*, or as matter of law, for a passenger on railroads operated by steam consciously or unconsciously to protrude his arm, head, elbow, hand or any part of his person through the window beyond the outer surface of the side of the car or outer edge of the window, barring a recovery for an injury which would not have been sustained but for such negligence;<sup>90</sup> while in a few others it has been held that whether it is

87. *Shumate v. Louisville & N. R. Co.*, 158 Fed. 901.

88. *Wenzel v. City & Elm Grove R. Co.*, 64 W. Va. 310, 61 S. E. 1001.

89. *O'Donnell v. Louisville & N. R. Co.*, 19 Ky. L. Rep. 1005, 42 S. W. 846.

90. *Knauss v. Lake Erie & W. R. Co.* (Ind. App.), 64 N. E. 95; *Union Pac. R. Co. v. Roeser* (Neb.), 95 N. W. 68; *Clarke v. Louisville & N. R. Co.*, 101 Ky. 34, 18 Ky. L. Rep. 1082, 36 L. R. A. 123, 8 Am. & Eng. R. Cas. N. S. 355, 2 Am. Neg. Rep. 360, 39 S. W. 840, where elbow protruded inadvertently and did not extend more than one and a half inches beyond the outer surface of the side of the car; *Shelton v. Louisville & N. R.*

*Co.*, 19 Ky. L. Rep. 215, 39 S. W. 842; *Richmond & D. R. Co. v. Scott*, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91; *Cummings v. Worcester, etc., St. R. Co.*, 166 Mass. 220, 44 N. E. 126; *Carrieo v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12; *Georgia Pac. R. Co. v. Underwood*, 90 Ala. 49; *Indianapolis, etc., R. Co. v. Rutherford*, 29 Ind. 82; *Pittsburgh, etc., R. Co. v. Andrews*, 39 Md. 392, 17 Am. Rep. 568; *Pittsburgh, etc., R. Co. v. McClurg*, 56 Pa. St. 294; *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533; *Dun v. Seaboard, etc., R. Co.*, 78 Va. 645, 49 Am. Rep. 388; *Todd v. Old Colony, etc., R. Co.*, 7 Allen (Mass.), 207, 83 Am. Dec. 679.

contributory negligence is a question of fact for the determination of the jury under all the circumstances of the case.<sup>91</sup> The question does not seem to have been determined definitely in the appellate courts of New York,<sup>92</sup> although the judgment in one case was to the effect that whether the plaintiff was negligent in riding with her arm out of the window was not a question of law, but of fact,<sup>93</sup> and in three other cases the records show that the jury in each case was instructed that if they found that the plaintiff was riding with his arm protruding from the open window, it was contributory negligence, and no recovery could be had, but the validity of the instructions was not considered in the higher courts.<sup>94</sup> In one of the cases cited the court also charged that if the passenger's arm, while resting on the sill, was thrown out by a sudden lurch of the car, that fact would not defeat his right to recover.<sup>95</sup> And it has been so held in other States where the passenger's arm was not protruding beyond the car but was thrown outside the car by the force of a collision.<sup>96</sup> It has been held to be contributory negligence in a passenger on an elevated railroad to place his hand on the sill under the window, without looking to see that the window was raised to the proper height to be held by the latch if in proper order.<sup>97</sup> In reference to street railroad cases the New York courts have held that a general rule applicable to all cases cannot be laid down as to whether a passenger upon a street car was negligent in

91. *McCord v. Atlanta, etc., R. Co.* (N. C.), 45 S. E. 1031; *Chicago, etc., R. Co. v. Pondrom*, 51 Ill. 333. 2 Am. Rep. 306; *Spencer v. Milwaukee, etc., R. Co.*, 17 Wis. 487, 84 Am. Dec. 758; *Quinn v. South Carolina R. Co.*, 29 S. C. 381.

92. *Francis v. New York Steam Co.*, 114 N. Y. 385.

93. *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 244, 64 Am. Dec. 502, 16 Barb. (N. Y.) 113.

94. *Breen v. New York Cent., etc., R. Co.*, 109 N. Y. 297, 4 Am. St. Rep.

450; *Hallahan v. New York, etc., R. Co.*, 102 N. Y. 194; *Dale v. Delaware, etc., R. Co.*, 73 N. Y. 468.

95. *Dale v. Delaware, etc., R. Co.*, 73 N. Y. 468.

96. *Farlow v. Kelly*, 108 U. S. 288; *Winters v. Hannibal, etc., R. Co.*, 39 Mo. 468; *Carrieco v. West Virginia, etc., R. Co.*, 35 W. Va. 389.

97. *Voorhees v. Kings County El. R. Co.*, 3 Misc. Rep. (N. Y.) 18, 21 N. Y. Supp. 775. But the contrary has been held in *Gulf, etc. R. Co. v. Killebrew (Tex.)*, 20 S. W. 182.



riding with his arm out of the window, and that whether the question is one of law or fact must be determined by the circumstances of each case, inasmuch as street railroads are operated under such widely different circumstances, some in the crowded thoroughfares of large cities and others in streets little used in suburban districts and villages.<sup>98</sup> But it has been held that the fact that a street car passenger, sitting beside an open window reading, with his arm resting on the sill, extended his arm not more than three inches outside the car, did not constitute contributory negligence, as a matter of law, precluding recovery for an injury to such arm caused by another car passing on a switch.<sup>99</sup> It has been held in other States, under similar circumstances, to be a question of fact.<sup>99a</sup> And in Missouri it is held a question not to be determined by any arbitrary rule, the court saying that "it does not necessarily follow, however, that because the exposure of the person from the window of an ordinary railroad carriage moved by steam is negligence, that the same exposure from the window of a street car is so. The motive power is much more under control in one case than the other, whether we speak of the carriage in which the passenger is or of anything likely to approach it from a parallel track, and the speed is less."<sup>99b</sup>

In an action against an electric railway company by a passenger whose hand, which she had extended out of the open window of

98. *Francis v. New York Steam Co.*, 114 N. Y. 385.

99. *Tucker v. Buffalo Ry. Co.*, 53 App. Div. (N. Y.) 571, 65 N. Y. Supp. 989.

99a. *Dahlberg v. Minnesota St. R. Co.*, 32 Minn. 404, 50 Am. Rep. 585; *Summers v. Crescent City R. Co.*, 34 La. Ann. 139, 44 Am. Rep. 419.

99b. *Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

**Projection of body from moving car.**—As to injury by being struck by a trolley pole at the side of a

car, *Huber v. Cedar Rapids, etc., R. Co.*, 3 St. Ry. Rep. 245, 124 Iowa. 556, 100 N. W. 478; *Cummings v. Wichita R. & L. Co.* (Kan.), 2 St. Ry. Rep. 278, 74 Pac. 1104; injury to passenger where his arm was protruding, see *Zeliff v. North Jersey St. Ry. Co.* (N. J.), 1 St. Ry. Rep. 541, 55 Atl. 95; see note on Collisions with obstacles near track, 2 St. Ry. Rep. 278. *Fort Wayne Tract. Co. v. Harndorf*, 3 St. Ry. Rep. 164 (Ind.), 72 N. E. 593 and notes.

the car, was struck by a trolley pole, it is not error for the trial court to refuse an instruction asked by plaintiff to the effect that the failure of defendant to give notice to its passengers of the proximity of the pole was such negligence as to preclude contributory negligence on the part of the plaintiff in so extending her hand outside of the car.<sup>99c</sup> It is negligent as a matter of law for a passenger traveling on a rapidly moving car to intentionally project his arm or a part thereof out of the window of the car.<sup>99d</sup> The slight exposure of a passenger's hand, arm, or head outside of a car window or doorway is not necessarily an act of negligence.<sup>1</sup> Where a passenger, in order to prevent spitting on the floor of a street car, stuck his head about two inches beyond the margin of the car and was struck by a pole erected near the track, he was entitled to recover for the injuries received.<sup>2</sup>

## § 20. Riding in elevator.

A guest of a hotel, riding in an elevator, cannot be held guilty of negligence when he assumes an attitude while so riding which its construction invites.<sup>3</sup> Where a passenger on a combined passenger and freight elevator, who was familiar with the construction of the elevator shaft, and knew that the car in its ascent passed within a short distance of the lintel, and that the car was without guard or rail on that side, thoughtlessly stood in such a position that his heel was caught between the car and the lintel as it passed

<sup>99c</sup> Chapman v. Capital Traction Co., 37 App. D. C. 479.

<sup>99d</sup> Interurban Ry., etc., Co. v. Hancock, 71 Ohio St. 88, 78 N. E. 964, 6 L. R. A. (N. S.) 997.

Where there were iron bars extending horizontally across the windows of an electric car, equally distant from each other, and plaintiff while sitting in the car permitted his arm or any part thereof to extend beyond the rods, and such act directly con-

tributed to an accident by reason of his arm being struck by a car on an adjoining track, he was guilty of contributory negligence barring recovery. Id.

1. La Barge v. Union Electric Co., 138 Iowa, 691, 116 N. W. 816.

2. City Electric Ry. Co. v. Salmon, 1 Ga. App. 491, 57 S. E. 926.

3. Fraser v. Harper House Co., 141 Ill. App. 390.

that point, his negligence was such that the court should have instructed for the defendant.<sup>4</sup> An instruction that the owner of an elevator does not insure the safety of a passenger unless he keeps himself and all parts of his body within the elevator proper, and does not owe the passenger any duty to protect him from the consequences of his own carelessness in putting his foot over the edge of the floor, is erroneous, where the passenger was only twelve years old, and the elevator conductor knew it was dangerous to stand near the door of the elevator when it was in motion.<sup>5</sup>

### § 21. Persons accompanying live stock.

A contract with a railroad for the transportation of horses, which permitted the shipper to accompany the horses, and required him to look after and feed them, entitled him to enter the stock car at reasonable times for that purpose, but did not make the car a place for his transportation when not earing for the horses, though it did not in terms provide where he should ride.<sup>6</sup> While a caretaker riding in the car with a shipment of live poultry instead of in the caboose assumed all risks reasonably incident to that mode of carriage, he did not assume those resulting from unnecessary and extraordinary occurrences involving dangers not incident to the proper handling of such freight trains.<sup>7</sup>

### § 22. Changing position.

That an electric railway passenger unnecessarily and negligently left a place of safety on a car and walked to the rear platform while the car was moving so rapidly as to make his position highly and obviously dangerous to one of ordinary prudence, and when it was manifested that he would probably fall from the car, and that as a proximate consequence of such attempt plaintiff fell from the car

4. *Beidler v. Branshaw*, 200 Ill. 425, 65 N. E. 1086, rev'g judg. 102 Ill. App. 187.

5. *Quimby v. Bee Bldg. Co.*, 87 Neb. 193, 127 N. W. 118.

6. *Bruce v. Chicago, etc., Ry. Co.*, 136 Mo. App. 204, 116 S. W. 447.

7. *Kloppenburg v. Minneapolis, etc., Ry. Co. (Minn.)*, 143 N. W. 322.

and was injured, shows a good defense to his claim for such injury.<sup>8</sup> Where a passenger, knowing the purpose of drop doors on the platform of a vestibuled train and of the reasonable use of the same while the train was at a station, left the coach she had boarded and went upon the platform for the sole purpose of standing there while the train was at the station, and she was injured by falling down the steps, because the drop floor was raised, and because of the absence of a light, she was negligent, precluding a recovery.<sup>9</sup> A passenger on a mixed train was not negligent in leaving his seat to change to the shady side of the car, as affecting the carrier's liability for injury to him caused by violent coupling of the cars, where the passenger cars had been waiting on the side track for about three-quarters of an hour; the passenger not being bound to look out of the window to ascertain whether a coupling was about to be made, since that would have been negligence, precluding recovery for any injury received in the act.<sup>10</sup> A passenger on a mixed train, who left his seat in the coach to get a drink of water while the coach was standing still, and while cars were being shifted, was not guilty of contributory negligence precluding a recovery for injuries received by the coach receiving an unusual and sudden jolt by shifting cars.<sup>11</sup> It is not contributory negligence for a passenger in the white coach of a train to go into the colored coach, the rules separating the coaches of whites and blacks being for the segregation of the races, and not for the safety of the passengers.<sup>12</sup> Where plaintiff left the passenger compartment of a carrier's combination car, in which there were empty seats, and went into the baggage compartment to talk to the baggage master,

8. *Birmingham Ry., etc., Co. v. Yates*, 169 Ala. 381, 53 So. 915.

9. *Clanton v. Southern Ry. Co.*, 165 Ala. 485, 51 So. 616, she assumed the risk of injury, though the carrier knew that passengers habitually resorted to the platform, where the carrier did not acquiesce therein

by keeping the drop door down at stations.

10. *Lancon v. Morgan's Louisiana, etc., S. S. Co.*, 127 La. 1, 53 So. 365.

11. *Suttle v. Southern Ry. Co.*, 150 N. C. 668, 64 S. E. 778.

12. *St. Louis, etc., R. Co. v. Evans*, 99 Ark. 69, 137 S. W. 568.

and a collision occurred, in which plaintiff was thrown over a low box of fowl, causing the injuries complained of, plaintiff's negligence, in changing his position in the passenger compartment and occupying an exposed position, contributed to his injury, and he was, therefore, not entitled to recover.<sup>13</sup>

### § 23. Passing from one car to another.

It is not negligence *per se* for a passenger to attempt to pass from one car to another of a moving train, but he assumes the risks incident to such an undertaking from ordinary, natural causes, and is bound to exercise due care in doing so.<sup>14</sup> If it appears that the passenger incurs additional risk by leaving his seat, or if he selects a time for doing so when there is necessarily increased violence in the movement of the train, then he is under a duty to use such care for his safety as a prudent person would under the circumstances, and failure to do so would charge him with contributory negligence.<sup>15</sup> Where a passenger voluntarily attempted to pass from one car to another while the train was running at a high rate of speed around a curve, and fell from the train,<sup>16</sup> and where a person in charge of live stock, while the train

13. *Bromley v. New York, etc., R. Co.*, 193 Mass. 453, 79 N. E. 775.

The fact that the conductor received and punched his ticket while he was in the baggage car did not constitute an acquiescence on the part of the carrier to his riding in an exposed position in such car. *Id.*

Evidence that it was customary for passengers between certain stations to ride in the baggage compartment of the car and to have their tickets punched and taken up by the conductor while there was properly excluded. *Id.*

14. *Lent v. New York Cent., etc., R. Co.*, 120 N. Y. 467; *San Antonio,*

*etc., R. Co. v. Choate*, 22 Tex. Civ. App. 618, 56 S. W. 214; *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493; *Cleveland, etc., R. Co. v. Manson*, 30 Ohio St. 451; *Davis v. Louisville, etc., R. Co.*, 69 Miss. 136; *Galveston, etc., R. Co. v. Morris (Tex.)*, 61 S. W. 709.

15. *Burr v. Pennsylvania R. Co.*, (N. J.) 44 Atl. 845.

16. *Dougherty v. Yazoo, etc., R. Co. (Miss.)*, 36 So. 699. See, however, *Louisville & N. R. Co. v. Berg*, 17 Ky. L. Rep. 1105, 32 S. W. 616; *Chesapeake & O. R. Co. v. Clowes*, 93 Va. 189, 4 S. E. 833.

was in motion, without due care, attempted to pass from the stock cars to the caboose over the tops of the intermediate cars while the train was passing through snow sheds in a severe storm,<sup>17</sup> he has been guilty of contributory negligence precluding recovery. So, where a passenger went from a caboose to an engine of a rapidly moving train when neither necessity nor duty called him.<sup>18</sup> And where a passenger, in making her passage from one car to another, without looking, and without necessity for so doing, stepped upon the buffers between the platforms as they separated with the movement of the train.<sup>19</sup> Where the passenger acts under the direction or at the command of the conductor or other servant of the carrier the courts have held that he was warranted in supposing that the conditions were such as to enable him to pass in safety and that he was, therefore, not guilty of contributory negligence.<sup>20</sup> But usually the question has been held to be one for the jury to determine under all the facts of the case whether it was negligent for the passenger to follow the direction or order of a servant of the carrier.<sup>21</sup>

Vestibules on passenger cars are designed to make it safe for passengers to pass from one car to another, and a passenger in so doing is not as a matter of law negligent.<sup>22</sup> Where a male passenger while the train was in motion left the day coach, having no

17. *Nelson v. Southern Pac. Co.*, 15 Utah 325, 49 Pac. 644. See also *Neville v. St. Louis, etc., R. Co.*, 158 Mo. 293, 59 S. W. 123.

18. *McDaniel v. Highland Ave., etc., R. Co.*, 90 Ala. 64.

19. *Snowden v. Boston, etc., R. Co.*, 151 Mass. 220.

20. *Lent v. New York Cent., etc., R. Co.*, 120 N. Y. 467; *Hannibal, etc., R. Co. v. Martin*, 111 Ill. 219; *Louisville, etc., R. Co. v. Kelley*, 92 Ind. 371, 47 Am. Rep. 149; *Davis v. Louisville, etc., R. Co.*, 69 Miss. 136

But the suggestion of a conductor has been held not to be a command or direction, and a passenger, acting voluntarily, was held to have assumed the risk. *Stewart v. Boston, etc., R. Co.*, 146 Mass. 605.

21. *McIntyre v. New York Cent., etc., R. Co.*, 37 N. Y. 287, and other cases cited under this section.

22. *Pittsburgh, etc., Ry. Co. v. Schepman*, 171 Ind. 71, 84 N. E. 988, revg. judg. (Ind. App.), 82 N. E. 998.

closet for men, for the smoking car to use a closet therein, and was injured in consequence of the negligence of a porter in closing the door to the smoker and smashing his fingers, and there was no regulation of the carrier forbidding passengers to go from one car to another, the injury to the passenger did not result from a risk assumed by him.<sup>23</sup> A passenger was not negligent in passing from one vestibuled coach to another if he exercised due care in doing so, as he could assume that he was safe, and that all appliances on the platforms, such as the doors over the steps, were in proper position.<sup>24</sup> A passenger who undertakes to pass from one car to another while the train is in motion assumes the risk of injury caused by an ordinary movement of the train of good construction and repair over a track in good condition, but does not assume any risk of injury resulting from the carrier's negligence. A passenger is not guilty of contributory negligence merely because he attempts to pass from one car to another of a moving train to do a favor for a lady passenger.<sup>25</sup> Where a passenger is directed by an agent of the carrier, acting in the line of his duty, to pass from one car to another while the train is in motion, and the danger in doing so is not obvious, he is not negligent in attempting to obey, and where injury results the carrier is liable.<sup>27</sup> The fact that a passenger was in the habit of traveling on vestibuled trains, and knew that they contained an unvestibuled sleeper, did not deprive him of the right to visit the dining car, or make it negligence for him to do so, and the question whether he was exercising ordinary care was for the jury.<sup>28</sup> A passenger while passing from one car in a railroad train to another while the train is in motion is not negli-

23. *St. Louis & S. F. R. Co. v. Neely* (Tex. Civ. App.) 100 S. W. 481.

24. *St. Louis, etc., Ry. Co. v. Oliver*, 92 Ark. 432, 123 S. W. 662.

25. *St. Louis, etc., Ry. Co. v. Pollock*, 93 Ark. 240, 123 S. W. 790.

26. *Galveston, etc., Ry. Co. v.*

*Patillo* (Tex. Civ. App.), 101 S. W. 492.

27. *Central of Ga. Ry. Co. v. Carleton*, 163 Ala. 62, 51 So. 27.

28. *Northern Pac. Ry. Co. v. Adams*, 116 Fed. 324, 54 C. C. A. 196, revd. 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513.

gent *per se*, but it is a question for the jury.<sup>29</sup> A passenger who, while passing from one car to another, stepped back to permit a lady passenger to pass in advance of him, and inadvertently stepped between the platforms, was negligent.<sup>30</sup> Where for the purpose of disconnecting a car in which a passenger was riding, the flanges on the car platform were raised and left in that position, and it was announced that the car was about to be detached, and a passenger in going forward to the car ahead tripped and was injured, having passed over the platform safely in going into the car, the passenger was not negligent in attempting to pass back that way after night and with only artificial lights.<sup>31</sup> Where a passenger on a train at night passed from one coach to another and by the conductor and porter, who were in the rear car, in search of water, and stepped off the back platform of the rear coach, thinking he was going into another, there being no light or guard chain on such rear car, he cannot recover for the injuries received; the proximate cause of the injury being his own negligence.<sup>32</sup> When a person is injured by ordinary agencies in consequence of passing from one street car to another, because of the ordinary vibration, or failure to get a firm foothold or grasp, or by losing his hold on the car, or a misstep, or losing his balance, his own negligence would prevent recovery.<sup>33</sup>

#### § 24. Leaving conveyance.

A passenger cannot recover from a carrier for personal injuries occasioned by his neglect to exercise proper care in alighting from the conveyance and to avail himself of the suitable place for landing and means of ingress to and egress from the cars or trains provided by the carrier.<sup>34</sup> But it has been held that, under the

29. *McAfee v. Huidekoper*, 9 App. D. C. 36.

30. *Louisville, etc., Ry. Co. v. Stout*, 66 Ill. App. 298.

31. *Chicago & A. R. Co. v. Gates*, 61 Ill. App. 211.

32. *Hunter v. Atlantic Coast Line*

*R. Co.*, 72 S. C. 336, 51 S. E. 860, 110 Am. St. Rep. 605.

33. *Eickhof v. Chicago N. S. St. Ry. Co.*, 77 Ill. App. 196.

34. *Drake v. Pennsylvania R. Co.*, 137 Pa. St. 352, 21 Am. St. Rep. 883; *Pennsylvania R. Co. v. Zebe*, 33 Pa.



circumstances of the case, a passenger was not under the imputation of negligence and could not be charged with contributory negligence, when alighting, for failure to retain hold of the rail, if it were practicable to do so, at the moment he was about to step from the car to the platform of the station;<sup>35</sup> nor for placing his hand on the brake wheel in leaving the train;<sup>36</sup> nor for getting off the train steps upon a connecting link between two cars when the train had halted at a station;<sup>37</sup> nor for passing over flat cars under the direction of a brakeman in order to reach a place for alighting,<sup>38</sup> nor for passing from a boat by a way upon a ferry bridge provided for animals and vehicles, upon invitation of the employes in charge of the bridge, where he received an injury from a cause not arising from or attendant upon his use of the bridge but from a cause *ab extra* that use.<sup>39</sup> A passenger has been held guilty of contributory negligence in leaving a train at a depot on the side opposite the platform provided for such purpose, where there was no paramount necessity for so doing and the platform was not unsafe;<sup>40</sup> in alighting on the track side at a place where there was no platform;<sup>41</sup> and in alighting from a rap-

St. 318, 37 Pa. St. 420; Chicago, etc., R. Co. v. Dingman, 1 Ill. App. 164; Graham v. Pennsylvania R. Co., 39 Fed. 596, leaving ferry boat by gangway intended for teams; Keokuk Packet Co. v. Henry, 50 Ill. 264, jumping from steam boat because of want of proper time and facilities for landing; Dodge v. Boston, etc., Steamship Co., 148 Mass. 207, 12 Am. St. Rep. 541, 37 Am. & Eng. R. Cas. 67, leaving boat at place not intended for the use of passengers and in violation of notice; Scully v. New York, etc., R. Co., 80 Hun (N. Y.), 197, 30 N. Y. Supp. 61, jumping from train which the conductor had neglected to stop at the passenger's destination.

35. McDonald v. Long Island R. Co., 116 N. Y. 546, 15 Am. St. Rep. 437; Martin v. Second Ave. R. Co., 3 App. Div. (N. Y.) 448, 38 N. Y. Supp. 220. See also, Delamaty v. Milwaukee, etc., R. Co., 24 Wis. 578.

36. Cleveland, etc., R. Co. v. McHenry, 47 Ill. App. 301.

37. Johnson v. Winona, etc., R. Co., 11 Minn. 296, 88 Am. Dec. 83.

38. Hartzig v. Lehigh Valley R. Co., 154 Pa. St. 364.

39. Watson v. Camden, etc., R. Co., 55 N. J. L. 125.

40. Louisville, etc., R. Co. v. Ricketts, 93 Ky. 116.

41. Morgan v. Camden, etc., R. Co. (Pa.), 16 Atl. 353.

idly moving cable car on the side next to a parallel track.<sup>42</sup> Other courts have held that it was not contributory negligence *per se* for a passenger to alight at a depot on the side of the train away from the depot and platform, but that the question as to whether the passenger's manner of alighting was negligent under the circumstances was one that should be submitted to the jury.<sup>43</sup> Proof that the passenger violated the regulations of the carrier, in leaving a car on the wrong side, even without the excuse of a cogent necessity, will not as a matter of law debar him from a recovery.<sup>44</sup> It has been held that if a passenger is injured by alighting of his own accord from the rear end of a car at a place where there is no platform, when by passing forward, he could alight with safety on the platform, he is guilty of contributory negligence;<sup>45</sup> but not so when there was no light at that point,<sup>46</sup> or when the passenger, who was a lady, could alight on the platform only by going forward through the smoker.<sup>47</sup> The passenger is under no obligation to be on the lookout to avoid danger from defects in the carrier's appliances or means of ingress or egress, and is not negligent unless he fails to use ordinary care after knowledge of a defect or peril is thrust upon him.<sup>48</sup>

42. *Weber v. Kansas City Cable R. Co.*, 100 Mo. 194, 18 Am. St. Rep. 541, 41 Am. & Eng. R. Cas. 117.

43. *Goldberg v. New York Cent., etc.*, R. Co., 133 N. Y. 561, 30 N. E. 597, 54 St. Rep. (N. Y.) 90, 24 N. Y. Supp. 1143; *Onderdonk v. New York, etc., R. Co.*, 74 Hun (N. Y.), 42, 26 N. Y. Supp. 310; *Plopper v. New York Cent. R. Co.*, 13 Hun (N. Y.), 625; *Dickens v. New York Cent. R. Co.*, 1 Abb. App. Dec. (N. Y.) 504; *Robostelli v. New York, etc., R. Co.*, 33 Fed. 796; *McQuilken v. Central Pac. R. Co.*, 64 Cal. 463, 16 Am. & Eng. R. Cas. 353; *Boss v. Providence, etc., R. Co.*, 15 R. I. 149, 21 Am. & Eng. R. Cas. 364; *Missouri Pac. R.*

*Co. v. Long*, 81 Tex. 253, 26 Am. St. Rep. 811.

44. *Chicago, etc., R. Co. v. Lowell*, 151 U. S. 209, 38 L. Ed. 131, 14 S. C. 281.

45. *Eckerd v. Chicago, etc., R. Co.*, 70 Iowa, 352. See also, *Chicago, etc., R. Co. v. Dingman*, 1 Ill. App. 164.

46. *McDonald v. Illinois Cent. R. Co.*, 88 Iowa, 345, 55 N. W. 102, 58 Am. & Eng. R. Cas. 263.

47. *Cartwright v. Chicago, etc., R. Co.*, 52 Mich. 606, 50 Am. Rep. 274, 16 Am. & Eng. R. Cas. 321.

48. *Ohio, etc., R. Co. v. Stanberry*, 132 Ind. 533, defective platform; *McDermott v. Chicago, etc., R. Co.*, 82 Wis. 246, movable bench which was

An alighting passenger must leave the train at his destination with reasonable promptness, and use ordinary care for his own safety.<sup>49</sup> A passenger, leaving a street car, must use ordinary care.<sup>50</sup> A passenger, attempting to alight from a street car, is bound to use reasonable care, proportionate to the risk incurred, to prevent injury, and, if injured by reason of his own contributory act, may not recover.<sup>51</sup> A street car passenger is bound to act with prudence, and to use the means provided for his safe transportation with reasonable circumspection and care, and to see that the car has stopped, and that he can safely get off before attempting to do so.<sup>52</sup> Where a passenger, who passed out of the coach after the brakeman announced the station and pushed back the door on a metal catch, was injured by the door closing without having been touched by any passenger, a finding that he exercised ordinary care was justified.<sup>53</sup> Where at a street railway transfer point one of the cars rounded a curve, but there was ample space for passengers to walk along the street adjacent to the car to make their transfer without danger from the overhang at the point of greatest projection, a passenger struck and injured by the overhang of a car while rounding the curve, because he walked too

not a reasonably safe appliance: *Bethman v. Old Colony R. Co.*, 155 Mass. 352, passenger passing over a movable truck which obstructed the way to the station platform.

49. *Kearney v. Seaboard Air Line Ry.*, 158 N. C. 521, 74 S. E. 593; *Dobson v. Duncan*, 90 S. C. 414, 73 S. E. 875; *Chicago, etc., R. Co. v. Lampman*, 18 Wyo. 106, 104 Pac. 533. A passenger is bound to use reasonable care and diligence in getting off a train. *Walthour v. Pennsylvania R. Co.*, 40 Pa. Super. Ct. 252.

50. *Lexington Ry. Co. v. Lowe*, 143 Ky. 339, 136 S. W. 618; *Dallas Consol. Elec. St. Ry. Co. v. Lasch* (Tex. Civ. App.), 99 S. W. 729; *St.*

*Louis, etc., Ry. Co. v. Plott* (Ark.), 157 S. W. 385.

51. *Coyle v. People's Ry. Co.*, 7 Pen. (Del.) 454, 80 Atl. 638.

"Reasonable care" is such care as a person of ordinary prudence would exercise under similar circumstances; such care being proportioned to the risk incurred. *Elliot v. Wilmington City Ry. Co.*, 6 Pen. (Del.), 570, 73 Atl. 1040.

52. *File v. Wilmington City Ry. Co.*, 7 Pen. (Del.) 463, 80 Atl. 623; *Reiss v. Wilmington City Ry. Co.*, (Del. Super.), 67 Atl. 153.

53. *Kellogg v. Boston & M. R. R.*, 210 Mass. 324, 96 N. E. 525.

close to the track, was negligent.<sup>54</sup> To authorize a passenger to start to alight, no further invitation is necessary than for the car to stop at a regular stopping place for passengers.<sup>55</sup> A passenger seeking to alight from a railroad train when incumbered with bundles or parcels so as to interfere with or impede locomotion should exercise a degree of care commensurate with the situation.<sup>56</sup> The prevalence of storm and freezing weather imposes upon a passenger an extra degree of care to prevent injury in alighting from a car.<sup>57</sup> Though a street car passenger knew the unsafe condition of the street in which she was injured while alighting from a car at night, she had the right to expect that the company having the same knowledge, would perform its duty in so stopping the car as to provide her with a safe place for alighting.<sup>58</sup> Where, when an electric car arrived at the terminus of its line, and the conductor was reversing the trolley to prepare the car for its return journey, and the night was dark and the reversal of the trolley extinguished the lights temporarily, a passenger electing to leave the car before the lights were restored by replacing the trolley pole on the trolley wire and injured in leaving the car, where it was not alleged that the place where the car stopped was unsafe, cannot recover for the injuries received.<sup>59</sup>

### § 25. Preparing to leave conveyance before it stops.

The calling of a station by the brakeman and the opening of the door of the car is an invitation to the passengers desiring to alight

54. *Greenan v. International Ry Co.*, 124 N. Y. Supp. 360.

55. *Indianapolis, etc., Rap. Trans. Co. v. Walsh*, 45 Ind. App. 42, 90 N. E. 138.

56. *Chicago & A. Ry. Co. v. Noble*, 132 Ill. App. 400.

A woman well along in years, but who was robust, was not guilty of contributory negligence in getting off a train without assistance at her destination, carrying a small valise and a suit case, in the dark, there being no assistance at hand. *Teale v.*

*Southern Pac. Co.* (Cal. App.), 129 Pac. 949.

57. *Riley v. Rhode Island Co.*, 29 R. I. 143, 69 Atl. 338, 15 L. R. A. (N. S.) 523.

58. *Murray v. Seattle Electric Co.*, 50 Wash. 444, 97 Pac. 458.

59. *Hester v. Savannah Electric Co.*, 130 Ga. 454, 60 S. E. 1045.

Plaintiff held guilty of contributory negligence in alighting from train or car. *Chicago, etc., R. Co. v. Claunts*, 99 Ark. 248, 138 S. W. 332; *Hower v. United Traction Co.*, 231

at the station to get ready to do so, but is an invitation to alight only after the train has stopped;<sup>60</sup> and a passenger alighting while the train is in rapid motion is negligent.<sup>61</sup> It is not negligence for a passenger on a railroad train to attempt to leave the car before the station is announced; there being no statute requiring passengers to remain in the car until such announcement, and it not being common knowledge that this is what the ordinary man would do.<sup>62</sup> Where a passenger on a street car, after signaling for a stop, went to the platform to alight when the car which was slowing down, stopped, he was not guilty of negligence, for the reason that the car company permitted persons to ride on platforms and in the aisles, and for the further reason that, if passengers were not ready to alight when cars were stopped, traffic would be delayed.<sup>63</sup> A passenger may leave his seat and prepare to alight after giving notice of his intention to do so, provided he uses due prudence and avails himself of his knowledge as to the operation of the cars.<sup>64</sup> Though a street car passenger, upon hearing the bell ring, arose in her seat to alight when the car stopped, the fact that the place she was passing when she arose was not a proper place to alight would not affect her right to recover for injuries by suddenly starting the car, where she did not attempt to leave

Pa. 626, 80 Atl. 1129; Austin Electric Ry. Co. v. Lane (Tex. Civ. App.), 120 S. W. 1011; Illinois Cent. R. Co. v. Massey, 97 Miss. 794, 53 So. 385; Morris v. Illinois Cent. R. Co., 127 La. 445, 53 So. 698; Caywood v. Seattle Electric Co., 59 Wash. 566, 110 Pac. 420; Johns v. Georgia Ry., etc., Co., 133 Ga. 525, 66 S. E. 269; South Covington, etc., R. Co. v. Cove, 29 Ky. Law Rep. 836, 96 S. W. 562; Shaw v. Seaboard Air Line Ry., 143 N. C. 312, 55 S. E. 713; Fadley v. Baltimore & O. R. Co., 153 Fed. 514, 82 C. C. A. 464; Hunter v. Louisville & N. R. Co., 150 Ala. 594, 43 So. 802, 9 L. R. A. (N. S.) 848.

Plaintiff held not guilty of con-

tributory negligence in alighting or endeavoring to alight. Hurley v. Metropolitan St. Ry. Co., 120 Mo. App. 262, 96 S. W. 714; Missouri, etc., Ry. Co. of Texas v. Hibbitts (Tex. Civ. App.), 109 S. W. 228.

60. Illinois Cent. R. Co. v. Dallas Adm'x, 150 Ky. 442, 150 S. W. 536.

61. Glascock v. Cincinnati, etc., Ry. Co., 140 Ky. 720, 131 S. W. 779.

62. Moses v. Boston & M. R. Co., 76 N. H. 570, 79 Atl. 21.

63. Anderson v. Metropolitan St. Ry. Co., 159 Mo. App. 141 S. W. 461; Holland v. Metropolitan St. Ry. Co., 157 Mo. App. 476, 137 S. W. 995.

64. Freeman v. Wilmington & P.

the car.<sup>65</sup> A street car passenger is not negligent in arising when the car is slowing down for a station and going on the platform preparatory to alighting when the car stops.<sup>66</sup> A passenger, who, on approaching his destination, leaves his seat and stands on the platform before the train stops at the station, cannot recover for injuries sustained in a fall caused by the stopping of the train with no more jerk than was incident to its stoppage in the exercise of ordinary care.<sup>67</sup>

### § 26. Alighting at place other than station or platform.

It is the duty of a passenger to exercise reasonable care in alighting from a car, and a passenger familiar with the railway and the operation of the cars is bound to avail himself of such knowledge.<sup>68</sup> It is not the act of a reasonably prudent man, accustomed to railroad travel, to step from a car into utter darkness under the supposition that the car had stopped at the usual place provided for the landing of passengers; the very darkness itself being sufficient to warn him that the station is not there.<sup>69</sup> A carrier is not liable for injury to an incumbered passenger who fell from a train after dark, while attempting to alight where the train made a slight stop just before reaching the station, where she acted hastily, was familiar with the station, knew that a trainman always assisted alighting passengers, and where the brakeman was standing opposite her on the next car ready to alight and assist the passengers when the train reached the station.<sup>70</sup> Unless an electric railway company has by its practice waived its established rule that passengers shall alight only at the designated stopping places the slowing up of a car before crossing another track, at a

Traction Co. (Del. Super.), 80 Atl. 1001.

65. *Wirona & W. Ry. Co. v. Rousseau*, 48 Ind. App. 248, 93 N. E. 34, rehearing denied 93 N. E. 1028.

66. *Birmingham Ry., etc., Co. v. Barrett* (Ala.), 60 So. 262.

67. *Lunsford v. Louisville & N. R. Co.*, 153 Ky. 283, 155 S. W. 378.

68. *Benson v. Wilmington City Ry. Co.*, 1 Boyce (24 Del.) 202, 75 Atl. 793.

69. *Ouellette v. Grand Trunk Ry. Co.*, 106 Me. 153, 76 Atl. 280.

70. *McMelon v. Illinois Cent. R. Co.*, 126 La. 606, 52 So. 783.

place not designated as a stopping place, is not an invitation to passengers to alight, and evidence that passengers have been in the habit of taking advantage of such slowing up or stopping to alight there does not establish such waiver.<sup>71</sup>

**§ 27. Alighting at wrong end or part of car or on wrong side of train.**

Where a carrier provided a place for its passengers to alight, and stopped its train there in the night after announcing the station, not having warned a passenger not to alight at the front end of the coach, that end being a usual place of exit, a passenger could assume, in the absence of knowledge of danger, that she could safely get off at that end.<sup>72</sup> Where a railroad company provides a platform for the use of passengers in getting on and off its trains, it will not be liable for injuries sustained by one in alighting from a train on the side opposite the platform, where it appears that he knew, or by diligence could have known, of the platform. and that, had he stepped off upon it, he would not have been injured.<sup>73</sup> Plaintiff was injured in alighting in the night-time from a moving train. He had been traveling with an excursion party, and the conductor had said, when taking up their tickets, "Don't be asleep when you get there." On approaching the station, the trainman was at rear end of the car with his lantern, which plaintiff knew; but he alighted from the car at the front end, where there was no trainman, under the mistaken belief, as he claimed, that the train had stopped. The railroad had failed to provide a light at the place where plaintiff left the car to enable passengers to see steps and to tell whether the train had stopped, and the station was not well lighted. It was held that plaintiff was guilty of contributory negligence and was properly nonsuited.<sup>74</sup>

**§ 28. Alighting at improper place or in improper manner.**

A passenger endeavoring to alight from a train is bound to use

71. *Stevens v. Boston Elevated Ry. Co.*, 199 Mass. 471, 85 N. E. 571.

31 Ky. Law Rep. 1173, 104 S. W. 752.

72. *Rearden v. St. Louis & S. F. Ry. Co.*, 215 Mo. 105, 114 S. W. 961.

74. *Bartle v. New York Cent., etc., R. Co.*, 121 App. Div. 72, 105 N. Y. Supp. 522.

73. *Louisville & N. R. Co. v. Payne*,

due care to ascertain whether the train has reached the place designed for passengers to alight, and has no right to assume it simply because the brakeman has announced the station, and the train has stopped; and he is guilty of contributory negligence if, by reason of a failure to use such care, he is injured by alighting at an improper place.<sup>75</sup> But where the appearances and circumstances are such as to reasonably indicate to the passenger that the train has stopped at the depot or for the purpose of discharging passengers, it is not negligent for the passenger to alight.<sup>76</sup> Persons alighting from railway trains upon the express or implied invitation of the officers in charge are justified in assuming that the officers have taken proper precautions to insure their safety.<sup>77</sup> And if the passenger is invited or requested by the conductor or

75. *Chicago, etc., R. Co. v. Sattler* (Neb.), 90 N. W. 649, 57 L. R. A. 890; *Barry v. Boston, etc., R. Co.*, 172 Mass. 109, 51 N. E. 518, 12 Am. & Eng. R. Cas. N. S. 245; *Dunn v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 258; *Nagle v. California Southern R. Co.*, 88 Cal. 86, train halting for a moment upon a trestle; *Brockway v. Lascala*, 1 Edm. Sel. Cas. (N. Y.) 135; *State v. Tom*, 8 Or. 177, stepping off boat before it had landed; *Ohio, etc., R. Co. v. Schiebe*, 44 Ill. 460, where a passenger train had run on a side track to allow a freight train to pass; *Illinois Cent. R. Co. v. Green*, 81 Ill. 19, 25 Am. Rep. 255, train stopping at bridge to take water; *Siner v. Great Western R. Co.*, L. R. 4 Exch. 117; *Georgia, etc., R. Co. v. Murray*, 113 Ga. 1021, 39 S. E. 427, momentary stopping of train to allow switch to be set.

A passenger negligently carried beyond his station and forced to get off at a place other than the station was not guilty of contributory neg-

ligence in returning by way of the track, when that was the most natural course. *New York, etc., R. Co. v. Doane*, 115 Ind. 435, 7 Am. St. Rep. 451. But if, after alighting under such circumstances, he attempts to do an act obviously dangerous, he is guilty of contributory negligence. *International, etc., R. Co. v. Folliard*, 66 Tex. 603, 27 Am. & Eng. R. Cas. 280. So, where he was himself negligent in not getting off at the station and the train was stopped at his request and he alighted at another place. *Wilson v. New Orleans, etc., R. Co.*, 68 Miss. 9.

76. *McAlan v. Trustees New York, etc., Bridge*, 43 App. Div. (N. Y.) 374, 60 N. Y. Supp. 176; *St. Louis, etc., R. Co. v. Farr*, 70 Ark. 264, 68 S. W. 243.

77. *Leveret v. Shreveport Belt Ry. Co.* (La.), 34 So. 579. See also, note on Acts constituting invitation to alight and cases cited, 3 St. Ry. Rep. 840.



other agent of the carrier to leave the car at an improper or dangerous place, he will not be chargeable with contributory negligence in alighting there unless the danger is obvious.<sup>78</sup> The announcement of the name of the station is not of itself an invitation to alight;<sup>79</sup> but if the train soon thereafter is brought to a full stop, in the absence of notice that the train has not come to a final stop for the discharge of passengers, a passenger is justified in supposing that the train has arrived at the station announced and that he can safely alight, and is not guilty of contributory negligence in attempting to do so, in the absence of circumstances and conditions which would obviously show to a reasonably prudent and careful person that the train had not arrived at the station or proper landing place for passengers.<sup>80</sup> The question as to whether the passenger was induced by the announcement to believe that his destination had been reached is usually one for the jury, and the fact that the act of alighting under such circum-

78. *Hulbert v. New York Cent., etc., R. Co.*, 40 N. Y. 145; *Bellman v. New York Cent., etc., R. Co.*, 42 Hun (N. Y.), 130, 122 N. Y. 671; *Hickey v. Railroad Co.*, 14 Allen (Mass.), 429; *Sweeny v. Railroad Co.*, 10 Allen (Mass.), 368; *Delamatyr v. Milwaukee, etc., R. Co.*, 24 Wis. 578; *Gadsden, etc., R. Co. v. Causler*, 97 Ala. 235; *Baltimore, etc., R. Co. v. Leapley*, 65 Md. 571, where a pregnant woman was directed to jump from the train which had stopped at a point distant from the platform; *Georgia, etc., R. Co. v. Usry*, 82 Ga. 54, 14 Am. St. Rep. 140, whether a pregnant woman could avoid the consequences to herself of such negligent act of the carrier by the use of ordinary care was a question for the jury.

79. *Gonzales v. New York, etc., R. Co.*, 33 N. Y. Super. Ct. 57; *East Tennessee, etc., R. Co. v. Holmes*, 97

Ala. 332, 58 Am. & Eng. R. Cas. 252; *Memphis, etc., R. Co. v. Stringfellow*, 44 Ark. 322, 51 Am. Rep. 598; *East Tennessee, etc., R. Co. v. Connor*, 15 Lea (Tenn.), 254; *Bridges v. North London R. Co.*, L. R. 7 H. L. 213.

80. *Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489; *Chicago, etc., R. Co. v. Arnold*, 144 Ill. 261; *McNulta v. Ensch*, 134 Ill. 46; *Central R. Co. v. Van Horn*, 38 N. J. L. 133; *Pennsylvania Co. v. Hoagland*, 78 Ind. 203, 3 Am. & Eng. R. Cas. 436; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Richmond, etc., R. Co. v. Smith*, 92 Ala. 237; *Smith v. Georgia Pac. R. Co.*, 88 Ala. 538, 16 Am. St. Rep. 63; *Mitchell v. Chicago, etc., R. Co.*, 51 Mich. 236, 47 Am. Rep. 566; *McGee v. Missouri Pac. R. Co.*, 92 Mo. 208, 1 Am. St. Rep. 706; *Southern Kansas R. Co. v. Pavey*, 48 Kan. 452.

stances occurred on a dark night will be evidence tending to show such belief.<sup>81</sup>

By stopping a street car so that plaintiff and other passengers could alight, the motorman assured her that she would have a reasonable opportunity to safely alight.<sup>82</sup> A passenger who has signaled the car to stop is justified in assuming that he might alight when the car did stop, notwithstanding it was in the middle of a block.<sup>83</sup> Where a conductor on a street car called out the street at which plaintiff, a passenger, intended to alight and the car immediately stopped, she had a right to assume, in the absence of warning to the contrary, that the car had stopped at such street, she being unacquainted with the neighborhood, and she was not guilty of contributory negligence in attempting to alight, though the car had not, in fact, reached plaintiff's destination.<sup>84</sup> But a passenger, who started to step off the rear platform of a street car before it had reached its usual stopping place, of which he was aware, and was injured by a sudden acceleration of the speed of the car, had no right to assume that the car was slowing down to enable him to alight.<sup>85</sup> Where the surroundings at the place where a train stops are such as to preclude a reasonable belief on a passenger's part that he is getting out where the company intended him to leave the train, and such that no ordinarily prudent person could suppose that the train had arrived at the place of his intended departure, a passenger who, notwithstanding, leaves the train at such a place and is hurt in consequence cannot recover damages.<sup>86</sup> But a passenger on an interurban car stopping at highway crossings does not assume the risk involved in stopping the car for him to alight at a more dangerous place than the usual place for alighting, where he had no knowledge of the added danger.<sup>87</sup> And a

81. See cases cited in last preceding note.

82. *Vine v. Berkshire St. Ry. Co.*, 212 Mass. 580, 99 N. E. 473.

83. *Gardner v. Metropolitan St. Ry. Co.*, 167 Mo. App. 605, 152 S. W. 98.

84. *McNally v. Metropolitan St. Ry. Co.*, 145 Mo. App. 127, 129 S. W. 464.

85. *Dwyer v. Auburn & S. Elec. R. Co.*, 131 App. Div. 477, 115 N. Y. Supp. 364.

86. *Farrell v. Great Northern Ry. Co.*, 100 Minn. 361, 111 N. W. 388, 9 L. R. A. (N. S.) 1113.

87. *McGovern v. Interurban Ry. Co.*, 136 Iowa, 13, 111 N. W. 412.

passenger is not guilty of contributory negligence in alighting from a train upon which he has been carried as a passenger at a point where he was expressly directed by the carrier to alight.<sup>88</sup> A passenger voluntarily riding on the platform, who alights from the train at a time and place which, if he had been inside the car, he would not have done, cannot recover for injury thereby sustained.<sup>89</sup>

### § 29. Alighting from train or car in motion.

It is presumptively a negligent act for a passenger to attempt to alight from a moving train;<sup>90</sup> and it is not sufficient to rebut the presumption that the trainman acquiesced in the action of the passenger, or that the company violated its duty or contract in not stopping the train, or that to remain on the train would subject the passenger to trouble or inconvenience, but to excuse such an act and free the passenger from the charge of contributory negligence there must be a coercion of circumstances which did not leave the passenger in the free and untrammelled possession of his faculties and

88. *Illinois Cent. R. Co. v. Johnson*, 123 Ill. App. 300, judg. affd. 221 Ill. 42, 77 N. E. 592.

89. *Wagner v. Atlantic Coast Line R. Co.*, 147 N. C. 315, 61 S. E. 71.

90. *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 57 Am. Rep. 760, 27 Am. & Eng. R. Cas. 155; *Burrows v. Erie R. Co.*, 63 N. Y. 556; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Geogagn v. New York, etc., R. Co.*, 10 App. Div. (N. Y.) 454, 42 N. Y. Supp. 205; *Redmond v. Rome, etc., R. Co.*, 16 N. Y. Supp. 330.

*Ga.*—*Atlanta, etc., R. Co. v. Dickerson*, 89 Ga. 455; *Whelan v. Georgia, etc., R. Co.*, 84 Ga. 506.

*Ind.*—*Louisville, etc., R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.

*Me.*—*Shannon v. Boston, etc., R. Co.*, 78 Me. 52.

*Mich.*—*Cousins v. Lake Shore, etc., R. Co.*, 96 Mich. 386.

*Pa.*—*Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 15 Am. St. Rep. 701; *New York, etc., R. Co. v. Enches*, 127 Pa. St. 316, 14 Am. St. Rep. 848; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323; *Clintoek v. Pennsylvania R. Co.*, 21 W. N. C. (Pa.) 133.

*Wis.*—*Brown v. Chicago, etc., R. Co.*, 80 Wis. 162; *Hemmingway v. Chicago, etc., R. Co.*, 72 Wis. 42, 7 Am. St. Rep. 823.

*Mass.*—*Gavett v. Manchester, etc., R. Co.*, 16 Gray (Mass.), 501, 77 Am. Dec. 422; *Lucas v. New Bedford, etc., R. Co.*, 6 Gray (Mass.), 64, 66 Am. Dec. 406, in the absence of anything to create excitement or cause alarm; *Brooks v. Boston, etc., R. Co.*, 135 Mass. 21, but not where plaintiff did not in fact know that the train was moving.

judgment.<sup>91</sup> In a number of cases it has been held that alighting voluntarily from a train in motion is negligence *per se*.<sup>92</sup> But many other authorities sustain the rule that alighting voluntarily from a train in motion is not contributory negligence *per se*. While, as a general proposition, it is conceded that it is imprudent and a want of ordinary care to alight from a train while it is in motion, whether it was so in a particular case must depend upon the circumstances under which the attempt was made, and, ordinarily, is a question for the jury.<sup>93</sup> Whether such an act was culpable

91. See New York cases cited in last preceding note.

92. *Secor v. Toledo, etc., R. Co.*, 10 Fed. 15.

*Ill.*—It is negligence, which precludes a recovery to get off a train of which the motive power is steam while it is still in motion. *Illinois Cent. R. Co. v. Cunningham*, 102 Ill. App. 206; *Louisville, etc., R. Co. v. Johnson*, 44 Ill. App. 56; *Dougherty v. Chicago, etc., R. Co.*, 86 Ill. 467; *Illinois Cent. R. Co. v. Lutz*, 84 Ill. 598; *Illinois Cent. R. Co. v. Slatton*, 54 Ill. 135, 5 Am. Rep. 109; *Ohio, etc., R. Co. v. Stratton*, 78 Ill. 88. *Compare Illinois Cent. R. Co. v. Able*, 59 Ill. 131.

*La.*—*Walker v. Vicksburg, etc., R. Co.*, 41 La. Ann. 795, 17 Am. St. Rep. 417; *Damont v. New Orleans, etc., R. Co.*, 9 La. Ann. 441, 61 Am. Dec. 214.

*N. C.*—*Morrow v. Atlanta, etc., Air Line R. Co. (N. C.)*, 46 S. E. 12.

*Wis.*—*Walters v. Chicago, etc., R. Co. (Wis.)*, 89 N. W. 140, where plaintiff knowingly and unnecessarily steps from a train in motion.

93. *N. Y.*—*Bucher v. New York Cent., etc., R. Co.*, 98 N. Y. 128.

*Ala.*—*Central R., etc., Co. v. Miles*, 83 Ala. 256.

*Ark.*—*St. Louis, etc., R. Co. v. Per-*

*son*, 49 Ark. 182; *Little Rock, etc., R. Co. v. Atkins*, 46 Ark. 423.

*Cal.*—*Carr v. Eel River, etc., Co.*, 98 Cal. 366.

*Colo.*—*Posten v. Denver Consol. Tramway Co.*, 3 St. Ry. Rep. 37 (Colo. App.), 78 Pac. 1067.

*Ga.*—*Covington v. Western, etc., R. Co.*, 81 Ga. 275; *West End, etc., St. R. Co. v. Mozely*, 79 Ga. 463.

*Ind.*—*Pittsburgh, etc., R. Co. v. Gray* (Ind. App.), 59 N. E. 1000; *Louisville, etc., R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443; *Pennsylvania R. Co. v. Marion*, 123 Ind. 415, 18 Am. St. Rep. 330.

*Iowa.*—*Raben v. Central Iowa R. Co.*, 74 Iowa, 732.

*Md.*—*Cumberland Valley R. Co. v. Mangers*, 61 Md. 53, 48 Am. Rep. 88.

*Mich.*—*Cousins v. Lake Shore, etc., R. Co.*, 96 Mich. 386.

*Mo.*—*Madden v. Missouri, etc., R. Co.*, 50 Mo. App. 664.

*Neb.*—*Chicago, etc., R. Co. v. Winfrey* (Neb.), 93 N. W. 526; *Chicago, etc., R. Co. v. Landauer*, 36 Neb. 642.

*Pa.*—*Pennsylvania R. Co. v. Peters*, 116 Pa. St. 206; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292, 72 Am. Dec. 787.

*Tex.*—*International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102,

or excusable has been held in many instances to depend upon all the facts and circumstances, such as the rapidity of motion of the train, the fact whether it was in the day time or at night, the distance from the car to the ground or other surface upon which the passenger proposed to alight, the age and vigor of the party, and whether he took the risk by the command or encouragement of the carrier's agents in charge of the train, or to escape a greater peril.<sup>94</sup> It is not contributory negligence *per se*, or as a matter of law, for a passenger to alight from a very slowly moving train, but the question is one for the jury to decide from all the attendant circumstances.<sup>95</sup> But there are cases where the undisputed facts have been such that the courts have held the question of con-

38 S. W. 401; Galveston, etc., R. Co. v. Smith, 59 Tex. 406.

Wis.—Hemmingway v. Chicago, etc., R. Co., 72 Wis. 42, 7 Am. St. Rep. 823.

Can.—Edgar v. Northern R. Co., 11 Ont. App. 452.

94. Bucher v. New York Cent., etc., R. Co., 98 N. Y. 128; Filer v. New York Cent. R. Co., 42 N. Y. 47, 10 Am. Rep. 327; Morrison v. Erie R. Co., 56 N. Y. 202; St. Louis, etc., R. Co. v. Cantrell, 37 Ark. 526; Little Rock, etc., R. Co. v. Atkins, 46 Ark. 423; Cumberland Valley R. Co. v. Maugans, 61 Md. 53, 48 Am. Rep. 88; Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 292; Wyatt v. Citizens R. Co., 62 Mo. 408; Georgia Pac. R. Co. v. West, 66 Miss. 310; Hemmingway v. Chicago, etc., R. Co., 72 Wis. 42, 7 Am. St. Rep. 823; Brooks v. Boston, etc., R. Co., 135 Mass. 21; Leggett v. Western New York, etc., R. Co., 143 Pa. St. 39.

95. McAlan v. Trustees New York, etc., Bridge, 43 App. Div. (N. Y.) 374, 60 N. Y. Supp. 176; Distler v. Long Island R. Co., 151 N. Y. 424,

45 N. E. 937, 35 L. R. A. 762; Pennsylvania Co. v. Marion, 123 Ind. 415, 18 Am. St. Rep. 330, train moving at speed of two miles an hour; Central R. Co. v. Miles, 88 Ala. 256, at speed of three miles an hour; Louisville, etc., R. Co. v. Crunk, 119 Ind. 542, 12 Am. St. Rep. 443, at speed of four and a half miles an hour; New York, etc., R. Co. v. Coulbourn, 69 Md. 361, 9 Am. St. Rep. 430, at speed of five miles an hour; Lake Shore, etc., R. Co. v. Bangs, 47 Mich. 470, at speed of six miles an hour; Nance v. Carolina Cent. R. Co., 94 N. C. 619; Lambeth v. North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508; Georgia Pac. R. Co. v. West, 66 Miss. 310; Shannon v. Boston, etc., R. Co., 78 Me. 52; Straus v. Kansas City, etc., R. Co., 75 Me. 185, 6 Am. & Eng. R. Cas. 384; Price v. St. Louis, etc., R. Co., 72 Mo. 414; Taylor v. Missouri Pac. R. Co., 26 Mo. App. 336; Kelly v. Hannibal, etc., R. Co., 70 Mo. 607; Lloyd v. Hannibal, etc., R. Co., 53 Mo. 509; Leslie v. Wabash, etc., R. Co., 88 Mo. 50; Richmond v. Quiney, etc., R. Co., 49 Mo. App. 104.

tributary negligence not to be one of fact for the jury, or of fact and law to be given to the jury with instruction, but one of law for the decision of the court. For example, where the act of the passenger was obviously dangerous and without reasonable necessity, and done with a full consciousness of danger and foolish rashness, which showed complete absence of ordinary care and prudence,<sup>96</sup> as alighting from a rapidly moving train,<sup>97</sup> or alighting when in an enfeebled and weak condition,<sup>98</sup> or when incumbered with luggage so as to be deprived of the ability to properly protect himself,<sup>99</sup> or alighting in the dark from a train known to be in motion.<sup>1</sup> But

**96. N. Y.**—*Morrison v. Erie, R. Co.*, 56 N. Y. 302.

*Ala.*—*East Tennessee, etc., R. Co. v. Holmes*, 97 Ala. 332; *Central, etc., R. Co. v. Miles*, 88 Ala. 261; *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600.

*Ind.*—*Toledo, etc., R. Co. v. Wingate (Ind.)*, 37 N. E. 274; *Woolery v. Louisville, etc., R. Co.*, 107 Ind. 381, 57 Am. Rep. 114, 27 Am. & Eng. R. Cas. 210.

*Ky.*—*Peak's Adm'r v. Louisville & N. R. Co.*, 23 Ky. L. Rep. 2157, 66 S. W. 995.

*Me.*—*Shannon v. Boston, etc., R. Co.*, 78 Me. 52.

*Mass.*—*La Pointe v. Boston & M. R. Co.*, 182 Mass. 227, 65 N. E. 44; *England v. Boston, etc., R. Co.*, 153 Mass. 490.

*Mo.*—*Tabler v. Hannibal, etc., R. Co.*, 93 Mo. 79; *Clotworthy v. Hannibal, etc., R. Co.*, 80 Mo. 220; *Nelson v. Atlantic, etc., R. Co.*, 68 Mo. 593; *Wyatt v. Citizens R. Co.*, 62 Mo. 408; *Doss v. Missouri, etc., R. Co.*, 59 Mo. 27, 21 Am. Rep. 371.

*Tex.*—*Houston, etc., R. Co. v. Leslie*, 57 Tex. 83.

**97. Ga.**—*McLarin v. Atlanta, etc., R. Co.*, 85 Ga. 504; *Watson v. Georgia Pac. R. Co.*, 81 Ga. 476; *Jarrett v. Atlanta, etc., R. Co.*, 83 Ga. 347, train moving at twenty-five miles an hour.

*Ind.*—*Woolery v. Louisville, etc., R. Co.*, 107 Ind. 381, 57 Am. Rep. 114, 27 Am. & Eng. R. Cas. 210, train moving at fifteen miles an hour.

*Mo.*—*Leslie v. Wabash, etc., R. Co.*, 88 Mo. 50. And see cases cited under last preceding note.

*Neb.*—*Chicago, etc., R. Co. v. Martelle (Neb.)*, 91 N. W. 364.

**98. Louisville, etc., R. Co. v. Lee**, 97 Ala. 325.

**99. Morrison v. Erie R. Co.**, 56 N. Y. 302; *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600; *Toledo, etc., R. Co. v. Wingate (Ind.)*, 37 N. E. 274.

**1. Morrison v. Erie R. Co.**, 56 N. Y. 302; *England v. Boston, etc., R. Co.*, 153 Mass. 490; *East Tennessee, etc., R. Co. v. Holmes*, 97 Ala. 332; *Central R., etc., Co. v. Latcher*, 69 Ala. 106, 44 Am. Rep. 505; *Richmond, etc., R. Co. v. Morris*, 31 Gratt. (Va.) 20.

where the danger was so sudden and unexpected as to leave no time for the passenger to deliberate and he acted according to his best judgment under the circumstances, as where the injury occurred because the carrier did not give the passenger a reasonable opportunity to leave the train before it started, and the train started just as he was about to step from the car to the station platform, or had partly descended the steps for the purpose of alighting, the presumption of negligence is rebutted and the question of contributory negligence is for the jury.<sup>2</sup> Where a passenger is induced, permitted, or directed, by the advice, permission, or order of an authorized servant of the carrier to attempt to leave a train while in motion, and thus put to a choice, without any fault on his part, whether to obey the advice, suggestion or order of the carrier's servant, and risk the danger of alighting, or remain aboard and suffer the inconveniences of being carried on, it is not an act of negligence *per se*, if alighting under such circumstances would not be obviously dangerous, as where the train is moving slowly; but whether it is imprudent and careless to make the attempt depends upon the circumstances, and it is a proper question for the jury whether his act is one of ordinary care and prudence under the circumstances or a rash and reckless exposure to peril and hazard.<sup>3</sup> But if the cars are going at a rapid rate and the danger

2. *Murphy v. Rome, etc., R. Co.*, 32 St. Rep. (N. Y.) 381, 10 N. Y. Supp. 354; *Nicholas v. Dubuque, etc., R. Co.*, 68 Iowa, 732; *Loyd v. Hannibal, etc., R. Co.*, 53 Mo. 509; *Leggett v. Western New York, etc., R. Co.*, 143 Pa. St. 39.

3. *Bucher v. New York Cent., etc., R. Co.*, 98 N. Y. 128; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327, 68 N. Y. 124; *Schurr v. Houston*, 10 St. Rep. (N. Y.) 262; *Quin v. Manhattan R. Co.*, 7 St. Rep. (N. Y.) 252; *South, etc., Alabama R. Co. v. Schauder*, 75 Ala. 142; *High-*

*land Ave., etc., R. Co. v. Winn*, 93 Ala. 309; *Georgia, etc., R. Co. v. McCurdy*, 45 Ga. 288; *St. Louis, etc., R. Co. v. Person*, 49 Ark. 182; *Gallaway v. Chicago, etc., R. Co.*, 87 Iowa, 458; *Raben v. Central Iowa R. Co.*, 74 Iowa, 732; *McCaslin v. Lake Shore, etc., R. Co.*, 93 Mich. 553; *Pittsburgh, etc., R. Co. v. Krouse*, 30 Ohio St. 222; *Western, etc., R. Co. v. Young*, 51 Ga. 489; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292; *Delaware, etc., Canal Co. v. Webster (Pa.)*, 6 Atl. 841, 27 Am. & Eng. R. Cas. 160; *England v. Boston, etc., R. Co.*, 153 Mass. 490;

of being injured by jumping from them is obvious, the attempt to leave the cars under such circumstances, even at the instance of the carrier's servants, would be a negligent act, as matter of law, and no recovery could be had against the carrier.<sup>4</sup> A passenger who attempts to alight from a moving train, without necessity, in spite of warnings by the company's servants,<sup>5</sup> or by a fellow passenger,<sup>6</sup> or in direct violation of a regulation of the defendant brought to his knowledge before the occurrence,<sup>7</sup> is guilty of contributory negligence.

Louisville, etc., R. Co. v. Stacker, 86 Tenn. 343; Edger v. Northern R. Co., 11 Ont. App. 452.

4. Filer v. New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Whitlock v. Corner, 57 Fed. 565; East Tennessee, etc., R. Co. v. Hughes, 92 Ga. 388; Jeffersonville, etc., R. Co. v. Swift, 26 Ind. 459; Bardwell v. Mobile, etc., R. Co., 63 Miss. 574, 56 Am. Rep. 842; Pittsburgh, etc., R. Co. v. Krouse, 30 Ohio St. 222; Vimont v. Chicago, etc., R. Co., 71 Iowa, 58, 28 Am. & Eng. R. Cas. 210; Masterson v. Macon City, etc., R. Co., 88 Ga. 436. But see Southwestern R. Co. v. Singleton, 66 Ga. 252; Jones v. Chicago, etc., R. Co., 42 Minn. 183; Wyatt v. Citizens R. Co., 55 Mo. 485.

5. New York, etc., R. Co. v. Enches, 127 Pa. St. 316; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147; Jewell v. Chicago, etc., R. Co., 54 Wis. 610, 41 Am. Rep. 63, 6 Am. & Eng. R. Cas. 379; Ohio, etc., R. Co. v. Schiebe, 44 Ill. 460.

6. Kilpatrick v. Pennsylvania R. Co., 140 Pa. St. 502.

7. Burrows v. Erie R. Co., 63 N. Y. 556.

**Passengers injured while alighting from street cars**—As to alighting from

car at a dangerous place, Fort Wayne Tract. Co. v. Morvilius (Ind.), 2 St. Ry. Rep. 221, 68 N. E. 304; as to failure to notify conductor of intention to alight, Spaulding v. Quincy & B. St. Ry. Co., 2 St. Ry. Rep. 441, 184 Mass. 470, 69 N. E. 217; as to injury while alighting by the sudden start of car, Meade v. Boston Elev. Ry. Co. (Mass.), 2 St. Ry. Rep. 456, 70 N. E. 197; as to burden of proof in an injury while alighting, Peek v. St. Louis Transit Co., 2 St. Ry. Rep. 508, 178 Mo. 617, 77 S. W. 736; as to amount of care to avoid injury to alighting passenger, Richmond Tract. Co. v. Williams, 2 St. Ry. Rep. 927, 102 Va. 253, 46 S. E. 292; as to contributory negligence upon the part of a passenger attempting to alight, Richmond Tract. Co. v. Williams, *supra*; a reasonable time to be allowed to passenger for alighting from car, Hannon v. St. Louis Transit Co. (Mo.), 2 St. Ry. Rep. 624, 77 S. W. 158; as to injury caused by attempting to alight from car which had slowed down in response to plaintiff's signal, by sudden start of car, Dawson v. St. Louis Transit Co. (Mo.), 2 St. Ry. Rep. 625, 76 S. W. 689; as to being injured while attempting to



## A passenger alighting from a moving train was not guilty of

alight while car was still in motion by sudden acceleration of speed, *Duffy v. St. Louis Transit Co. (Mo.)*, 2 St. Ry. Rep. 626, 78 S. W. 831; as to injury caused by attempting to alight while car was in motion, *Champane v. La Crosse City Ry. Co.*, 121 Wis. 554, 2 St. Ry. Rep. 988, 99 N. W. 334; as to injury by sudden start of car while alighting, *Hastings v. Boland* 136 Mich. 240, 2 St. Ry. Rep. 503, 98 N. W. 1017; *Brazie v. St. Louis Transit Co. (Mo.)*, 2 St. Ry. Rep. 624, 76 S. W. 708; *Seamell v. St. Louis Transit Co.*, 102 Mo. App. 198, 2 St. Ry. Rep. 626, 76 S. W. 660; *Paganini v. North Jersey St. Ry. Co. (N. J.)*, 2 St. Ry. Rep. 731, 57 Atl. 128; *San Antonio Tract. Co. v. Welter (Tex.)*, 2 St. Ry. Rep. 900, 77 S. W. 414; as to injury to passenger alighting from car, *Boone v. Oakland Transit Co. (Cal.)*, 1 St. Ry. Rep. 14, 73 Pac. 243; *Denver Consol. Tramway Co. v. Rush (Col.)*, 1 St. Ry. Rep. 30, 73 Pac. 664; *Henning v. Louisville Ry. Co.*, 1 St. Ry. Rep. 238, 24 Ky. L. Rep. 2419, 74 S. W. 209; *Lee v. Elizabeth, P. & C. J. Ry. Co. (N. J.)*, 1 St. Ry. Rep. 539, 55 Atl. 106; *Koues v. Metropolitan St. Ry. Co.*, 1 St. Ry. Rep. 602, 86 App. Div. (N. Y.) 611, 83 N. Y. Supp. 380; *Gillespie v. Yonkers R. Co.*, 1 St. Ry. Rep. 644, 87 App. Div. (N. Y.) 38, 83 N. Y. Supp. 1043; *Fuller v. Dennison & Sherman Ry. Co. (Tex.)*, 1 St. Ry. Rep. 780, 74 S. W. 940. See also note, passengers injured while alighting, 2 St. Ry. Rep. 988, 3 St. Ry. Rep. 715; note, Invitation to board car, 3 St. Ry. Rep. 913.

Other cases in regard to passengers injured while alighting from street cars are as follows: *Dambman v. Metropolitan St. R. Co.*, 3 St. Ry. Rep. 663, 180 N. Y. 384, 73 N. E. 59; *Murnahan v. Cincinnati, etc., R. Co.*, 3 St. Ry. Rep. 267 and notes (Ky. L. Rep.), 86 S. W. 688; *Macon Ry. & L. Co. v. Vining*, 3 St. Ry. Rep. 83, 120 Ga. 511, 48 S. E. 232; *Houghton v. Louisville Ry. Co.*, 3 St. Ry. Rep. 282, 26 Ky. L. Rep. 393, 81 S. W. 695; *Posten v. Denver Consol. Tramway Co.*, 1 St. Ry. Rep. 37 and notes (Colo. App.), 78 Pac. 1067; *Topp v. United Rys. & Elec. Co.*, 3 St. Ry. Rep. 332 and notes, 99 Md. 630, 59 Atl. 52; *Johnson v. Yonkers R. Co.*, 3 St. Ry. Rep. 715, 101 App. Div. (N. Y.) 65, 91 N. Y. Supp. 508; *Maloney v. Metropolitan St. R. Co.*, 3 St. Ry. Rep. 716, 95 App. Div. (N. Y.) 393, 88 N. Y. Supp. 638; *McDonough v. Third Ave. R. Co.*, 3 St. Ry. Rep. 716, 95 App. Div. (N. Y.) 311, 88 N. Y. Supp. 609. See also Notes on passenger alighting in unsafe place, 2 St. Ry. Rep. 221, 997; note on safe place for alighting, 1 St. Ry. Rep. 255; *Senf. v. St. Louis & Sub. Ry. Co.*, 3 St. Ry. Rep. 559, 112 Mo. App. 74, 86 S. W. 887; *McDonald v. St. Louis Transit Co.*, 3 St. Ry. Rep. 559, 108 Mo. App. 374, 83 S. W. 1001; *Kroner v. St. Louis Transit Co.*, 3 St. Ry. Rep. 560, 107 Mo. App. 41, 80 S. W. 915; *Pim v. St. Louis Transit Co.*, 3 St. Ry. Rep. 560, 108 Mo. App. 713, 84 S. W. 155; *Parker v. St. Louis Transit Co.*, 3 St. Ry. Rep. 561, 108 Mo. App. 465, 83 S. W. 1016; *McKinstry v. St. Louis Trans. Co.*, 3

contributory negligence unless the risk was such as a man of ordinary care and prudence would not have undertaken under the circumstances.<sup>8</sup> Ordinarily a passenger who is injured by stepping from a moving train is guilty of such contributory negligence as to prevent recovery, but if, owing to darkness and the absence of lights, he steps from a slowly moving train in obedience to the direction of one of the carrier's servants and is injured, the carrier is liable; the negligence of its servant being the proximate cause of his injury.<sup>9</sup> Where a passenger was injured in attempting to alight from a car in motion between stations, he cannot recover.<sup>10</sup> It is negligence for a passenger to attempt to alight from a train in motion.<sup>11</sup> It is not negligence *per se* for a passenger to alight from a moving train or street car.<sup>12</sup> Ordinarily a passenger is not justified in alighting from a train in motion, except at his own risk.<sup>13</sup> Passengers getting off moving trains are chargeable with contributory negligence.<sup>14</sup> But the fact that the point at which the train slowed down, and at which plaintiff attempted to alight from the slowly moving train, was in the midst of a switchyard, where there was likely to be a number of other trains, does not render plaintiff guilty of contributory negligence adequate to defeat a recovery, where he was not hurt by reason of any of those dangers.<sup>15</sup> A street car passenger should not attempt to alight when the car is moving, either before it has stopped, or after it has started after

St. Ry. Rep. 561, 108 Mo. App. 12, 82 S. W. 1108; *Cody v. Duluth St. Ry. Co.*, 3 St. Ry. Rep. 452 (Minn.), 102 N. W. 201.

8. *Louisville & N. R. Co. v. Dilburn* (Ala.), 59 So. 438; *Smith v. Southern Ry. Co.*, 80 S. C. 1, 61 S. E. 205, where the circumstances are such as to make the danger of alighting obvious to such a person it is negligence to alight.

9. *Louisville & N. R. Co. v. Moore*, 150 Ky. 692, 150 S. W. 849.

10. *Tannchill v. Birmingham Ry.*,

*etc.*, Co. (Ala.), 58 So. 198.

11. *Dallas v. Illinois Cent. R. Co.*, 144 Ky. 737, 139 S. W. 958.

12. *Chicago, etc., Ry. Co. v. Lloyd*, 129 Ill. App. 156; *Galveston, etc., R. Co. v. Krennek* (Tex. Civ. App.), 138 S. W. 1154.

13. *Chicago, etc., R. Co. v. Lampman*, 18 Wyo. 106, 104 Pac. 533.

14. *Hoylman v. Kanawha & M. Ry. Co.*, 65 W. Va. 264, 64 S. E. 536.

15. *Pierce v. Georgia R., etc., Co.*, 9 Ga. App. 666, 72 S. E. 66.

it has stopped.<sup>16</sup> While alighting from a moving street car does not, in all cases, constitute negligence as matter of law, yet an adult man of ordinary intelligence, laboring under no fright or excitement, and confronted with no exigency, who alights from a street car, which to his knowledge is moving at the rate of six miles an hour, is negligent.<sup>17</sup> Generally a passenger, alighting from the conveyance of a carrier, should wait until such conveyance has come to a complete stop, or is moving so slowly as not to enhance the danger attending an attempt to alight.<sup>18</sup> Where the plaintiff boarded a train to assist a passenger, her jumping off after the train started was contributory negligence precluding recovery for injury.<sup>19</sup> A passenger did not assume the risk of injury by stepping straight out from a car step after the train had started, unless he knew that such method of alighting was dangerous and liable to result in injury.<sup>20</sup> Whether it was contributory negligence for a passenger to alight from a moving train depends upon the speed of the train and his condition as to being incum-

16. *Parker v. United Rys. of St. Louis*, 154 Mo. App. 126, 133 S. W. 137.

Where a car stops at such a point as if in obedience to her signal, a passenger may reasonably consider the act of stopping as an invitation to alight, and may reasonably assume that the operatives of the car will conduct themselves accordingly. *Monroe v. United Rys. Co.*, 154 Mo. App. 39, 133 S. W. 645.

It is contributory negligence for a passenger to alight from a rapidly moving street car. *Scroggins v. Metropolitan St. Ry. Co.*, 138 Mo. App. 215, 120 S. W. 731.

A charge that it is negligence on the part of a passenger to step off of a moving street car, when the circumstances are such as to make the danger obvious to a person of ordi-

nary prudence and sense, is correct. *Norton v. Columbia Elec. St. Ry., etc.*, Co., 83 S. C. 26, 64 S. E. 962.

17. *Fosnes v. Duluth St. Ry. Co.*, 140 Wis. 455, 122 N. W. 1054.

18. *Craig v. Wabash R. Co.*, 142 Mo. App. 314, 126 S. W. 771.

A passenger who attempts to alight from a car moving at a dangerous rate of speed and is injured, is guilty of negligence directly contributing to his injury, and cannot recover. *Ghio v. Metropolitan St. Ry. Co.*, 125 Mo. App. 710, 103 S. W. 142.

19. *Louisville & N. R. Co. v. Wilson*, 30 Ky. Law Rep. 1055, 100 S. W. 290, 8 L. R. S. (N. S.) 1020.

20. *St. Louis S. W. R. Co. of Texas v. Bryant* (Tex. Civ. App.), 103 S. W. 237.

bered with baggage, etc.<sup>21</sup> Where a girl under fourteen years of age becomes frightened because carried by a street car beyond her known destination and alights from a moving car, it is error to charge that she may recover for the injuries received, though negligent in acting as she did.<sup>22</sup> Where plaintiff, a passenger, as defendant's open trolley car was approaching a customary stopping place, and slowing down to make the stop, stepped on the running board, and then to the ground, and was injured, and defendant's conductor, who had frequently seen plaintiff alight at the same place, saw his movements at the time, and gave him no warning, the plaintiff was guilty of contributory negligence.<sup>23</sup> Where a passenger knew that the train was rounding a double curve at thirty miles an hour and could not be slowed down to allow him to jump off, and he went on the platform and down on the lower step, from which he was thrown, he was guilty of contributory negligence, and the mere fact that the engineer had promised to slow down to allow him to jump off was no excuse; the promise of the engineer so to do is not a promise of the carrier.<sup>24</sup> A street railway company is not liable for injury to a passenger from his attempting to alight from a moving car where the injury is caused by the passenger's act without any negligence on the part of the company.<sup>25</sup> Where plaintiff attempted to alight from a moving street car, without any necessity or invitation, and was injured, she was negligent as a matter of law.<sup>26</sup>

21. *Dilburn v. Louisville & N. R. Co.*, 156 Ala. 228, 47 So. 210.

A passenger is not negligent in alighting from a moving train if the speed of the train and all the surrounding circumstances are such that a person of ordinary prudence would have done the same thing. *Puget Sound Electric Ry. v. Felt*, 181 Fed. 938.

22. *Kruger v. Omaha, etc., St. Ry. Co.*, 80 Neb. 490, 114 N. W. 571.

23. *Cosgrove v. Consolidated Ry. Co.*, 80 Conn. 717, 68 Atl. 249.

24. *Clark v. Atchison, etc., Ry. Co.*, 164 Cal. 363, 128 Pac. 1032.

25. *Burton v. Wichita R., etc., Co.*, 89 Kan. 611, 132 Pac. 183.

26. *Armstrong v. Portland Ry. Co.*, 52 Or. 437, 97 Pac. 715.

**§ 30. Alighting from moving car on failure to stop at station.**

A passenger attempting to alight from a train while it is passing a station where it should stop to permit him to alight is not, as a matter of law, guilty of negligence, unless the attending circumstances show so clearly that he acted recklessly and imprudently that reasonable minds would not arrive at any other conclusion; but otherwise it is a question for the jury, since failure to stop the train at a station does not justify a passenger in attempting to alight under circumstances obviously hazardous.<sup>27</sup> A passenger, who, without knowing the speed of the train, which failed to stop at a station, jumped therefrom while it was running at twenty miles an hour, without asking the advice of any member of the train crew or requiring that the train should stop, but who relied on his own judgment as to the speed of the train, was guilty of contributory negligence precluding a recovery for the injuries sustained.<sup>28</sup> Where a carrier, taking a passenger beyond his destination, stops the train and lets him off, he may assume that the place selected is reasonably safe for the purpose.<sup>29</sup> A street car passenger carried by his station and directed to alight in a dark, strange place has a right to assume that the place is safe, in the absence of directions how to reach his destination.<sup>30</sup> Where the operatives of a street car negligently carry a passenger beyond his destination, such conduct does not absolve him from contributory negligence in jumping from the car while it is in motion.<sup>31</sup> But where the agent and employes of a railway company negligently failed to bring the train to a stop at a station where a passenger is entitled

27. *Kansas City Southern Ry. Co. v. Worthington*, 101 Ark. 128, 141 S. W. 1173.

28. *Texas & O. N. R. Co. v. Wallace* (Tex. Civ. App.), 139 S. W. 1052.

29. *Birmingham Ry., etc., Co. v. Anderson*, 163 Ala. 72, 50 So. 1021.

30. *Cossitt v. St. Louis & S. Ry. Co.*, 224 Mo. 97, 123 S. W. 569.

A street car passenger discharged

into a dark, strange place between stations, who is ignorant of the fact that he has been carried by his station, must use ordinary care for his safety in proceeding to his destination; but he is not required to walk on the right of way to the next station. *Id.*

31. *Newport News, etc., Co. v. McCormick*, 106 Va. 517, 56 S. E. 281.

to leave the train, his attempt to leave it while in motion cannot be held to be negligence as a matter of law, unless the danger attending the attempt was so great as to be obvious to a person of common prudence and ordinary intelligence.<sup>32</sup> Where a passenger, after being informed by the conductor that the train will not stop at his intended destination, jumps off the moving train while passing the station, the carrier is not liable for the injuries sustained by him in consequence.<sup>33</sup>

**§ 31. Alighting from moving car on failure to stop for sufficient time.**

After a street car has stopped at a street crossing, a passenger desiring to leave it may assume that it will not start until he has had a reasonable time to leave it in safety.<sup>34</sup> Ordinary prudence requires that a passenger shall not alight from a moving car, but if the exit is properly begun while the car is stationary, and the car is suddenly started with undue violence before the passenger alights, the carrier may be negligent and the passenger free from negligence.<sup>35</sup> A passenger attempting to alight from a moving train is generally guilty of contributory negligence precluding recovery for the injuries received, though the carrier was guilty in the first place in not stopping its train a reasonable time for the passenger to leave it in safety.<sup>36</sup> Negligence of a railroad company in failing to stop its train at a station long enough to permit passengers to alight will not absolve a passenger from negligence in attempting to alight after the train has started.<sup>37</sup> A passenger in seeking to alight from a railroad train has a right to assume that ample time will be afforded for such purpose.<sup>38</sup> A passenger on

32. *Turley v. Atlanta, etc., Ry. Co.*, 127 Ga. 594, 56 S. E. 748, 8 L. R. A. (N. S.) 695.

33. *Owens v. Atlantic Coast Line R. Co.*, 147 N. C. 357, 61 S. E. 198.

34. *Moore v. Aurora, etc., R. Co.*, 246 Ill. 56, 92 N. E. 573.

35. *Florida Ry. Co. v. Dorsey*, 59 Fla. 260, 52 So. 963.

36. *Johnson v. St. Joseph Ry., etc., Co.*, 143 Mo. App. 376, 128 S. W. 243.

37. *Farley v. Norfolk & W. Ry. Co.*, 67 W. Va. 350, 67 S. E. 1116.

38. *Jurkiewicz v. Ill. Cent. R. Co.*, 145 Ill. App. 44.

a street car has a right to assume that the conductor will not start the car while the passenger is in the act of alighting, though he sees the conductor's arm raised toward the bell cord.<sup>39</sup> A street car passenger is not guilty of contributory negligence in alighting where the car comes to a stop for the purpose of permitting him and other passengers to alight and while he is alighting it suddenly starts.<sup>40</sup> If a train stops at a station a reasonable time for a passenger to alight with safety, and the passenger in attempting to leave the train does not act as a person of ordinary care and prudence would act under the circumstances, and his failure to exercise ordinary care contributes to his injury, he cannot recover.<sup>41</sup> Where an old and infirm woman was unable to alight from a train during the time it stopped, she was guilty of contributory negligence in attempting, with the aid of her son, to alight after the train had started.<sup>42</sup>

### § 32. Defective or unlighted platform.

A passenger going on a street car platform to alight could assume that the platform was safe, and that he could safely step on any part of it.<sup>43</sup> One who receives injuries from stepping from a street car into a hole in a platform provided by the company for passengers may not recover, where the defect is visible and nothing appears by which his attention was averted.<sup>44</sup>

### § 33. Leaving premises by improper course.

An alighting passenger is entitled to reasonable protection against accident in passing from the station premises, but must use proper care to avoid danger; the degree required depending upon

39. *Hurley v. Metropolitan St. Ry. Co.*, 120 Mo. App. 262, 96 S. W. 714.

40. *Burke v. Bay City Traction, etc., Co.*, 147 Mich. 172, 13 Detroit Leg. N. 974, 110 N. W. 524.

41. *Texas Midland R. Co. v. Ritchey* (Tex. Civ. App.), 108 S. W. 732.

42. *Nashville, etc., Ry. v. Casey*, 1 Ala. App. 344, 56 So. 28.

43. *Hertzberg v. San Antonio Traction Co.* (Tex. Civ. App.), 120 S. W. 572.

44. *Riley v. Cincinnati Traction Co.*, 28 Ohio Cir. Ct. Rep. 626.

the particular circumstances.<sup>45</sup> Where plaintiff, a passenger, who had previously been in defendant's station, by mistake opened the door, which was not marked as a place for use by passengers, which led into the basement and, although it was daylight, she entered without looking where she was going and fell, it was held that she could not recover for resulting damages.<sup>46</sup> A bright eight and one-half year old boy was guilty of contributory negligence, where, while leaving defendant's passenger platform after alighting from its train, he ran ahead of adults who accompanied him, and attempted to cross through the yards, where notices were posted against trespassers, instead of by the regular way provided, and ran into a switch engine as it moved from behind cars, the danger from which was apparent to those in the vicinity.<sup>47</sup>

### § 34. Standing near or between tracks and crossing intervening tracks.

An intending passenger who leaves a position of safety and takes one of manifest danger between two tracks, upon one of which his train is expected, and stands so near an approaching train that he is struck by a car,<sup>48</sup> or who, instead of occupying the premises and platforms provided by the railroad company for the use of passengers, chooses, without necessity, to stand between a baggage platform and the track, in a space not wide enough to protect him from the train which strikes him,<sup>49</sup> is guilty of negligence which will prevent his recovery for injuries sustained thereby. A passenger is not in the exercise of due care who goes unnecessarily upon the track of a railroad, over which frequent trains are passing, and at a point where intervening ob-

45. *Washington, etc., Ry. Co. v. Vaughan*, 111 Va. 785, 69 S. E. 1035.

46. *Speck v. Northern Pac. Ry. Co.*, 108 Minn. 435, 122 N. W. 497.

47. *Perego v. Lake Shore & M. S. Ry. Co.*, 158 Mich. 225, 16 *Detroit Leg. N.* 592, 122 N. W. 535.

48. *McGeehan v. Lehigh Valley R. Co.*, 149 Pa. St. 188, 24 *Atl.* 205, 30 *W. N. C.* 140, 1 *Pa. Adv. R.* 704.

49. *Little Rock, etc., R. Co. v. Cavenesse*, 48 *Ark* 106.



jects obstruct a view of the track, although he has just alighted from a train, near a station where there is nothing to indicate to him any other mode of egress;<sup>50</sup> nor one who, in daylight, attempts to cross the tracks at a station in front of an approaching train which she saw and which was so near that when she fell the engine struck her before she could recover herself, there being no need for her to cross the tracks, as she might have learned on inquiry which she had ample opportunity to make, the railroad company holding out no invitation for her to cross;<sup>51</sup> nor one who was not merely crossing but standing on a track in full view of an approaching train, which, under the circumstances, he might and should have seen, and whose signals he might and should have heard.<sup>52</sup> But whether a passenger was negligent in crossing a track in accordance with a custom acquiesced in by the carrier, instead of taking an unlighted street which passed under the track is a question for the jury.<sup>53</sup> A passenger when taking or leaving a railroad car or train at a station, has a right to assume that the company will not expose him to unnecessary danger by passing trains; while he himself must exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them a safe passage to and from the train. The general rule which obtains in case of a person crossing a railroad track that a failure to stop, look, and listen will constitute contributory negligence *per se*, does not apply to a passenger so alighting from

50. *Baneroft v. Boston, etc., R. Co.*, 97 Mass. 275; *Illinois Cent. R. Co. v. Strauss*, 75 Miss. 367. 22 So. 822, nor one who attempted to pass through a small opening between the rear end of two trains, there being no necessity for him to do so.

51. *Young v. Old Colony R. Co.*, 156 Mass. 178, 30 N. E. 560. See also *Wright v. Great Northern R. Co.*, 1. R. S. Ir. 257.

52. *Weeks v. New Orleans, etc., R. Co.*, 40 La. Ann. 800.

53. *Chicago, etc., R. Co. v. Lowell*, 151 U. S. 209. So where an obstruction placed in his way by the carrier necessitated the passenger's stepping on a side track on leaving the station. *Sanchez v. San Antonio, etc., R. Co.*, 3 Tex. Civ. App. 89.

or boarding a train, although the failure to do so may be a material and important fact to be considered by the jury upon the question of contributory negligence.<sup>54</sup> But it is the duty of a railroad passenger, on alighting, knowing that a train is just due, to look in the direction from which it should come, before attempting to cross the railroad track, and if he omits to do so, he is guilty of contributory negligence.<sup>55</sup> And so where he leaves the train before it is stopped and before any invitation or notice to leave the train has been given, and attempts to cross the intervening tracks,<sup>56</sup> or crosses another track after alighting from a cable car at his destination,<sup>57</sup> he is bound to use the same care as would be required of a person attempting to cross a railroad track upon a highway. The same rule has been applied, in Minnesota, where a passenger left his train, which was side tracked at an intermediate station to allow a train from the opposite direction to pass, and attempted to cross the track for the purpose of re-entering;<sup>58</sup> but in New York such an act is held not to be contributory negligence, as matter of law.<sup>59</sup> In Massachusetts it has been held that the

54. *Bucher v. Long Island R. Co.*, 161 N. Y. 222, 55 N. E. 899; *Terry v. Jewett*, 78 N. Y. 338; *Graven v. Mac Leod*, 92 Fed. 846, 35 C. C. A. 47, 14 Am. & Eng. R. Cas. N. S. 305; *Brassell v. New York Cent., etc., R. Co.*, 84 N. Y. 241; *St. Louis, etc., R. Co. v. Johnson*, 59 Ark. 122; *Franklin v. Southern California Motor Road Co.*, 85 Cal. 63; *Atehison, etc., R. Co. v. Shean*, 18 Colo. 368; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 3 Chic. L. J. Wkly. 399, 50 N. E. 713; *Pennsylvania Co. v. Kean*, 41 Ill. App. 317; *Philadelphia, etc., R. Co. v. Anderson*, 72 Md. 519, 20 Am. St. Rep. 483; *Burbridge v. Kansas City Cable R. Co.*, 36 Mo. App. 669; *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 394, 42 Atl. 333, 5 Am. Neg. Rep. 407; *Pennsylvania R. Co. v.*

*White*, 88 Pa. St. 327; *Brown v. Great Western R. Co.*, 52 L. T. N. S. 622. *Alabama G. S. R. Co. v. Coggin*, 88 Fed. 455, 60 U. S. App. 140; *Weeks v. New Orleans, etc., R. Co.*, 40 La. Ann. 800; *Jewett v. Klein*, 27 N. J. Eq. 550; *Warner v. Baltimore & O. R. Co.*, 168 U. S. 339, 42 L. Ed. 491.

55. *Gonzales v. New York, etc., R. Co.*, 38 N. Y. 440, 98 Am. Dec. 58.

56. *Parsons v. New York Cent., etc., R. Co.*, 37 Hun (N. Y.), 128.

57. *Buzby v. Philadelphia Traction Co.*, 126 Pa. St. 559, 42 Am. & Eng. R. Cas. 144.

58. *De Kay v. Chicago, etc., R. Co.*, 41 Minn. 178, 16 Am. St. Rep. 687.

59. *Wandell v. Corbin*, 38 Hun (N. Y.), 391, 17 St. Rep. (N. Y.) 718.

mere fact that a passenger began to cross a railroad track at a time when her view along the tracks was obstructed by a departing train,<sup>60</sup> or that she did not at the instant of stepping on the track, look to ascertain whether a train was approaching,<sup>61</sup> was not conclusive of a want of due care, and that whether there was due care on the part of the passenger was a question for the jury.<sup>62</sup> But in a later case it was held that a passenger could not recover for personal injuries sustained by being struck by a train passing on another track, where he got off his train between the two tracks and attempted to cross when he could easily have seen the approaching train had he looked before attempting to cross.<sup>63</sup> Where the railroad track is the usual and only practicable route by which a passenger may go from the station to his train, the railroad company will not be heard to say that a passenger, by taking such route, becomes guilty of negligence.<sup>64</sup> One who, after signaling an approaching street car which is about to round a curve, places himself in such close proximity to the track that he will be inevitably struck by the overhang of the car when it rounds the curve, assumes the risk incident to the dangerous position which he has taken, and cannot hold the street railroad company liable for his injuries.<sup>65</sup> But one who took a position which was safe with reference to the ordinary cars which the street railroad used, and with which he was familiar, having no notice up to the time he was struck by it that an approaching car was of greater width than the ordinary cars, did not assume the risk and was not guilty of contributory negligence.<sup>66</sup> A pedestrian who, after signaling an approaching car about half a block away to stop

60. *Mayo v. Boston, etc., R. Co.*, 104 Mass. 137.

61. *Chaffee v. Boston, etc., R. Corp.*, 104 Mass. 108.

62. *Gaynor v. Old Colony, etc., R. Co.*, 100 Mass. 208, 97 Am. Dec. 96.

63. *Connolly v. New York, etc., R. Co.*, 158 Mass. 8. See also *Debbins v. Old Colony R. Co.*, 154 Mass. 402.

74 Am. & Eng. R. Cas. 531, 28 N. E. 274.

64. *Chicago, etc., R. Co. v. Lagerkrans* (Neb.), 91 N. W. 385.

65. *Gravey v. Rhode Island Co.*, 26 R. I. 80, 58 Atl. 456.

66. *Denison & S. Ry. Co. v. Craig* (Tex. Civ. App.), 80 S. W. 865.

at a customary place for taking passengers, proceeds diagonally across the tracks to such place, assuming that the motorman, as the car approaches the stopping place, will use reasonable care to permit her to cross in safety, is not negligent, as a matter of law, for failing to look behind her after she started in her diagonal course across the tracks.<sup>67</sup>

67. *Copeland v. Metropolitan St. R. Co.*, 177 N. Y. 570, 69 N. E. 1121, affg. 78 App. Div. (N. Y.) 418, 79 N. Y. Supp. 1054.

**Street railway cases:** Passenger passing back of standing car onto parallel track and in front of approaching car, *Metropolitan St. Ry. Co. v. Ryan*, 3 St. Ry. Rep. 259, 39 Kan. 538, 77 Pac. 267; failure of passenger on alighting from car to look out for an approaching car upon a parallel track before crossing it, *Cleveland Elec. Ry. Co. v. Wadsworth*, 2 St. Ry. Rep. 818, 25 Ohio Cir. Ct. 376; as to duty to look and listen, *Indianapolis St. Ry. Co. v. Tenner (Ind.)*, 1 St. Ry. Rep. 179, 67 N. E. 1044; passing from behind obstructions upon track, *Ames v. Waterloo & Cedar Falls Rapid Transit Co. (Iowa)*, 1 St. Ry. Rep. 199, 95 N. W. 161, 79 S. W. 999; see also, note, 2 St. Ry. Rep. 433; as to injury caused by the burning out of a fuse, *Cassady v. Old Colony St. Ry. Co. (Mass.)*, 1 St. Ry. Rep. 330, 68 N. E. 10; as to use of effective brakes, *Mack v. Los Angeles Tract. Co. (Cal.)*, 1 St. Ry. Rep. 19, 73 Pac. 455; duty of company as to appliances, *Leveret v. Shreveport Bolt Line Co. (La.)*, 1 St. Ry. Rep. 254, 34 So. 579; as to how the liability of the company is to be determined, *Zimmerman v. Denver Consol. Tram-*

*way Co. (Colo.)*, 1 St. Ry. Rep. 21, 72 Pac. 807; see note, 1 St. Ry. Rep. 331; note on appliances for protection of passengers, 1 St. Ry. Rep. 20; note on injuries from electricity, 1 St. Ry. Rep. 639.

**Collision with persons who have alighted from cars.**—A street railway company running a car past another, which is standing still, receiving or discharging passengers at the intersection of streets, must not unnecessarily expose pedestrians to the danger of collision. *Consol. Tract. Co. v. Scott*, 58 N. J. L. 682, 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620; *Scott v. Third Ave. R. Co.*, 16 N. Y. Supp. 350; *Driscoll v. Market St. R. Co.*, 97 Cal. 553.

Where a person starts to cross the track as soon as the car from which he had alighted has passed him, without turning his head in either direction to see if any train is coming, and regardless of a caution given him by the conductor, he is guilty of contributory negligence, and no recovery for his death can be had of the company. *Meserole v. Brooklyn City R. Co.*, 57 Hun, 591, 10 N. Y. Supp. 813.

Where a person had alighted from a street car and was injured as he passed around behind the car from which he alighted, by the car on the other track, he ceased to be a passenger when he had safely reached the

### § 35. Crossing other tracks.

A passenger, who, after alighting at the east platform of a double-track railroad, attempts to cross to the west platform, and is struck by a train on the west track, where he had an unobstructed view for 1200 feet, is negligent.<sup>68</sup> A passenger who had just alighted was guilty of contributory negligence in stepping on a muddy inclined cross-tie, on which she slipped.<sup>69</sup> Decedent, a man of forty-six, in full possession of his faculties, went to defendant's station with friends to take an east-bound train to Rockaway Beach, going on defendant's east-bound platform. After standing on the platform a few moments, he decided to return home to the west, and for this purpose started to cross the east-bound tracks through a gate in a fence dividing the tracks to the platform of the west-bound station. When opposite the opening, he stepped from the platform to the track, and, as he passed over the second rail, he was struck by an east-bound train and killed. From the time he left his companions he was walking directly

street and the company was not under the high degree of care due a passenger to protect him. *Chattanooga Elec. Ry. Co. v. Roddy*, 105 Tenn. 666, 58 S. W. 646, 51 L. R. A. 885.

One who steps from a street railway car to the street is not upon the premises of the railway company, but upon a public place where he has the same rights as every other pedestrian, and over which the company has no control. His rights are then those of the traveler upon the highway and not those of the passenger. *Creamer v. West End St. Ry. Co.*, 4 Am. Elec. Cas. 476, 156 Mass. 320, 31 N. E. 391. After a person has alighted from a car and starts to cross a parallel track, it is his duty to look for an approaching car upon that track, and he is guilty of contributory negligence if he steps upon

the track in front of an approaching car without so looking. *Landrigan v. Brooklyn Heights R. Co.*, 32 App. Div. 43, 48 N. Y. Supp. 454. The circumstances, however, may be such as to relieve such a person from liability for his negligence. *Wise v. Brooklyn Heights R. Co.*, 46 App. Div. 246, 61 N. Y. Supp. 530. It has been held that the stopping of the car and the invitation to alight upon the side of the car next to the parallel track given by the company's employees, may be regarded as an assurance of the absence of danger. *Sehneider v. Market St. Ry. Co. (Cal.)*, 66 Pac. 734.

68. *Weisenberg v. Lackawanna, etc., R. Co.*, 237 Pa. 33, 85 Atl. 74.

69. *Fulghum v. Atlantic Coast Line R. Co.*, 158 N. C. 555, 74 S. E. 584.

toward the approaching train, which could have been seen for 475 feet. There was evidence that, though there was no headlight, the station platform for a distance of more than 400 feet was lighted, and that the whistle was blown at that distance from the station. It was held that intestate was negligent, as a matter of law, though there was evidence from two or three witnesses who were paying no attention to the movements of trains that they heard no whistle.<sup>70</sup> Passengers on a freight train on which their live stock is in transit, in going between a caboose and the depot, are required to look and listen when about to cross an intervening track, their obligation being greater than that of persons passing between a station platform and a passenger train at a stop for passengers.<sup>71</sup> The rule requiring that one crossing a railroad over a highway should stop, look, and listen is not to be rigorously applied to a passenger at a station going from his train.<sup>72</sup> But where one who has alighted from a trolley car crosses the track behind the car without looking and without waiting until the car had passed sufficiently to permit observation, and is struck by a car on the other track, his negligence prevents recovery.<sup>73</sup> Where a street railway passenger, without waiting for the car to stop, jumped off and immediately started in the rear of the car to cross the other tracks, and a moment's notice would have apprised him, either by the corner lights of the car which struck him or by the sound, that the car was approaching, a finding that he was free from negligence is against the weight of evidence.<sup>74</sup> A carrier, however, owes a duty to passengers alighting at a regular station that while making their egress they be not struck by other cars, and, though a passenger must exercise care for his safety, he may assume that the tracks

70. *Griffith v. Long Island R. Co.*, 147 App. Div. (N. Y.) 693, 132 N. Y. Supp. 641, appeal to Court of Appeals granted (1912), 133 N. Y. Supp. 1124.

71. *Coon v. Atchison, etc., Ry. Co.*, 82 Kan. 311, 108 Pac. 85.

72. *Struble v. Pennsylvania Co.*, 226 Pa. 118, 75 Atl. 17.

73. *Eagen v. Jersey City, etc., Ry. Co.*, 74 N. J. Law, 699, 67 Atl. 24.

74. *Wilson v. Rochester, etc., Ry. Co.*, 123 App. Div. 90, 108 N. Y. Supp. 117.

between the alighting place and the station will be kept safe while he is crossing; and hence the mere fact that he fails to look and listen for approaching cars before attempting to cross will not, as a matter of law, constitute contributory negligence, preventing recovery if he is struck by such a car.<sup>75</sup> Where a passenger alights from an electric car at a place where there are platforms along the tracks, and goes behind the car from which he alights, and is struck by a car on the next track, he cannot recover, where he did not look for it, and took the chance of crossing in front of it.<sup>76</sup>

### § 36. Negligence as to incidental dangers.

A passenger cannot recover for illness caused by failure to heat the coach, if his contributory negligence proximately caused the injury, and the passenger's failure to protect himself from unnecessary cold or provide sufficient clothing may or may not be contributory negligence according to the circumstances.<sup>77</sup> A passenger made sick by remaining in a cold waiting room after arrival at her destination is not chargeable with contributory negligence for failure to call the station agent's attention to the duty imposed on him by Texas Rev. St. 1895, art. 4521, and by the common law, to

75. Birmingham Ry., etc., Co. v. Landrum, 153 Ala. 192, 45 So. 198.

76. Yevsack v. Lackawanna, etc., R. Co., 221 Pa. 493, 70 Atl. 937, 18 L. R. A. (N. S.) 519.

77. Southern Ry. Co. v. Harrington, 166 Ala. 630, 52 So. 57.

Since a postal clerk is required by act of Congress to remain in the mail car while on duty, he is not *prima facie* guilty of contributory negligence precluding recovery for illness by remaining in the car knowing that it is so insufficiently heated as to be uncomfortable.

A white female passenger sustained injuries in consequence of the failure of the carrier to heat the coach. The

smoking and colored coaches and a sleeper were warm. It was not shown that the passenger knew that there was a sleeping car attached to the train, or that the other two coaches were warm. No one, in answer to her complaints, told her to go into other cars because they were warm. She could not, without violating the law, go into the negro coach, and females were not expected to occupy the smoking car. It was held insufficient to raise the question of contributory negligence of the passenger in failing to go into another coach. Texas & N. O. R. Co. v. Harrington (Tex. Civ. App.), 98 S. W. 653.

keep the place warm.<sup>78</sup> A passenger, who asked the conductor to see the latter's automatic pistol, and who took the pistol and returned it to the conductor, was not guilty of negligence *per se*, and his act does not preclude a recovery for injuries sustained in consequence of the conductor causing the pistol to be discharged.<sup>79</sup> It is not necessarily contributory negligence for a passenger to place his hand upon a car door frame at a place where the closing of the door will cause injury.<sup>80</sup> The unexplained falling of the window of a car soon after the passenger entered was not sufficient to charge him with knowledge that the window catch was defective, and subject him to an imputation of contributory negligence in thereafter using the window.<sup>81</sup> A passenger was guilty of contributory negligence barring recovery for injury on being shot on alighting by one fel-

78. Texas Cent. R. Co. v. Perry (Tex. Civ. App.), 147 S. W. 305.

Where some of the injuries sustained by a passenger from exposure in a cold waiting room were sustained before plaintiff could be chargeable with negligence in failing to leave the station and go to a hotel, her cause of action was not wholly barred on the ground of contributory negligence. *Id.* She was not chargeable with contributory negligence for remaining so long as was reasonably necessary. *Id.* The carrier could not escape liability by showing that the whole or a part of the waiting room was so cold that it was contributory negligence for the passenger to remain there. *Id.*

A passenger who had to change cars, once at S. and later at B., and who, from the washing of the waiting room at B. while she was there, caught cold, was not guilty of contributory negligence because not waiting longer at S. and taking a later train from there, which would have enabled her

to connect with her train at B. without waiting there so long. *Neal v. Southern Ry. Co.*, 92 S. C. 197, 75 S. E. 405.

79. Texas Midland R. R. v. Monroe (Tex. Civ. App.), 155 S. W. 973.

A passenger, who subjects himself to a known danger from the negligence of the conductor in showing an automatic pistol or one reasonably to be expected, is guilty of contributory negligence, so that an instruction on assumption of risk is properly refused. *Id.*

80. Christensen v. Oregon Short Line R. Co., 35 Utah, 137, 99 Pac. 676, 20 L. R. A. (N. S.) 255.

81. Cleveland, etc., Ry. Co. v. Hadley, 170 Ind. 204, 84 N. E. 13, rehearing 82 N. E. 1025, denied.

A passenger in a railway car has the right to hoist the window for any proper purpose, and to assume that the catch with which it is equipped is suitable and sufficient to hold it when latched properly. *Id.*



low passenger attempting to shoot another, if he left the car while the pistol was pointed toward the platform, and the danger was as obvious to him as to the carrier.<sup>82</sup> A person going to a train then due to meet a friend, who exercised due care in passing from the depot to the train, was not so negligent in undertaking to pass between cars three feet apart on an intervening track as to prevent his recovery for injuries by one of the cars suddenly closing the space, under the rule in Alabama that the failure to stop, look, and listen before crossing a track is such contributory negligence as will defeat a recovery, in the absence of evidence that the company was guilty of reckless or wanton negligence.<sup>83</sup> Plaintiff was insulted by another passenger, who was intoxicated and seated opposite him, and plaintiff left his seat and appealed to the conductor, who laughed at him. He returned to his seat, and the drunken passenger kicked him. He again appealed to the conductor, and again returned to his seat, when he was assailed and injured by the drunken passenger. It was held that the passenger was not guilty of contributory negligence.<sup>84</sup>

### § 37. Injury avoidable by care on part of carrier.

Under the doctrine of last clear chance, a street railroad company is required to exercise reasonable care to avoid injury to a passenger negligently placing himself in a position of danger by getting on the step of a moving car while the gate is closed.<sup>85</sup> If

82. *Penny v. Atlantic Coast Line R. Co.*, 153 N. C. 296, 69 S. E. 238.

83. *Louisville & N. R. Co. v. Smith*, 135 Ky. 462, 122 S. W. 806.

84. *Wachser v. Interborough Rap. T. Co.*, 125 N. Y. Supp. 767, 69 Misc. Rep. 346.

Add to section 37

85. *Norfolk, etc., Terminal Co. v. Rotolo*, 195 Fed. 231.

One intending to become a passenger on an electric street car, who attempts to board the car while in mo-

tion, and when the gates are closed, is chargeable with negligence as matter of law, which will bar recovery from the company for an injury received by striking or being struck by another car while so outside the gates, unless, after his peril was apparent, defendant negligently failed to protect him when it was within its power by the exercise of reasonable care so to do. *Norfolk, etc., Terminal Co. v. Rotolo*, 195 Fed. 4.

The rule of last clear chance is only

the maxim, "*Volentix non fit injuria*," is a rule of law, it does not relieve a carrier from liability for its failure to prevent a boy jumping from a moving train, where he did not know that it owed him such duty.<sup>86</sup> In an action for the death of one intending to take passage on a street car, to authorize a recovery on the theory or negligence of the defendant, supervening contributory negligence of the plaintiff's intestate, it must appear that the motorman failed to exercise reasonable care after the peril of the intestate became, or in the exercise of due care ought to have become, known to him, when from the exercise of such care the intestate would not have been injured.<sup>87</sup> Where a passenger has negligently placed himself in a position of peril, he can recover for an injury, if defendant, knowing of his dangerous position, neglects to exercise ordinary care to prevent the injury.<sup>88</sup> Where plaintiff attempted to board a street car after being warned by the motorman not to do so, and the car could not, by the exercise of ordinary care, be stopped in less than thirty-five to forty-five feet, defendant is not liable for injuries received by plaintiff while being dragged that distance, but would be liable only for injuries received after the car had traveled that distance.<sup>89</sup> Where a passenger attempted to alight from a car moving at a dangerous rate of speed, the operators of the car were not obliged to make an effort to avert danger to him, unless they saw his situation in time to have done so, and they were not charged with the duty of discovering his peril; it not being reasonable to suppose that one would attempt to alight at such a time.<sup>90</sup> Where a passenger, after alighting from a street car, passed round the end of the car, and was struck by a car

applicable to cases where the defense is contributory negligence. *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 400, 91 Pac. 436.

86. *Kambour v. Boston & M. R. R.* (N. H.), 86 Atl. 624.

87. *Kruck v. Connecticut Co.*, 84 Conn. 401, 80 Atl. 162.

88. *Montgomery v. Colorado Springs & I. Ry. Co.*, 50 Colo. 210, 114 Pac. 659.

89. *Graefe v. St. Louis Transit Co.*, 224 Mo. 232, 123 S. W. 835.

90. *Ghio v. Metropolitan St. Ry. Co.*, 125 Mo. App. 710, 103 S. W. 142.

traveling in the opposite direction, which she could not see until just before she was struck, she was not barred from recovering by contributory negligence, if the motorman by ordinary care and by keeping a sharp lookout could have stopped the car in time to have avoided the injury.<sup>91</sup> Though negligence of a passenger contributed to his being thrown from a train, yet, the carrier having left him on the ground in the hot sun and rain for three hours without attention, when it was only four or five miles to the next station, it is liable for the damage suffered by him through its neglect to give him proper attention after the accident.<sup>92</sup> Where the proximate cause of injury to a trespasser on a passenger train is the failure to use ordinary care to avoid injuring him after his presence has become known, his own antecedent negligence will not bar a recovery.<sup>93</sup> A passenger may assume that a carrier will in no wise be negligent, and he may govern his conduct accordingly, and, if his conduct be such that but for the negligence of the carrier he would not have been injured, contributory negligence will not be charged against him.<sup>94</sup> Where one attempting to leave a descending elevator which failed to stop was struck on the head by the top of the car and killed, the doctrine of the last clear chance had no application.<sup>95</sup> Where plaintiff about to take an approaching street car was struck by the overhang of the fender as it was rounding the curve, he was required to prove that the motorman saw him in a position of peril in time to have avoided injuring him by stopping the car, and negligently failed to do so. in order to recover on the issue of discovered peril.<sup>96</sup>

91. *Louisville Ry. Co. v. Mitchell*, 138 Ky. 190, 127 S. W. 770; *Louisville City Ry. Co. v. Hudgins*, 30 Ky. Law Rep. 316, 98 S. W. 275, 7 L. R. A. (N. S.) 152.

92. *Yazoo & M. V. R. Co. v. Byrd*, 89 Miss. 308, 42 So. 286.

93. *Louisville & N. R. Co. v. Plunkett*, 6 Ga. App. 684, 65 S. E. 695.

94. *Hickey v. Chicago City Ry. Co.*, 148 Ill. App. 197.

95. *Real Estate Trust & Ins. Co. v. Gwyn*, 113 Va. 337, 74 S. E. 208.

96. *Townsend v. Houston Electric Co. (Tex. Civ. App.)*, 154 S. W. 629. Add to section 38

### § 38. Willful injury by carrier's employes.

Where a passenger has negligently placed himself in a position of peril, he can recover for a willful or intentional injury, irrespective of the carrier's failure to exercise ordinary care to prevent the injury.<sup>97</sup> Contributory negligence is no defense to a suit for wanton, negligent injury to a street railway passenger.<sup>98</sup> Contributory negligence of an injured passenger will not shield the carrier from liability for the injury if inflicted by its servant's negligence marked by gross or willful misconduct.<sup>99</sup> A motorman who relizes the helpless condition and peril of an intending passenger asleep on the track at a station in time to avoid injuring him, but recklessly runs over him, is guilty of wanton negligence rendering his employer liable.<sup>1</sup> In a passenger's action for injuries, contributory negligence and assumption of risk were not defenses to the counts which alleged that the injuries were due to the wantonness of the company's servants or agents.<sup>2</sup> The misconduct of a passenger assaulted by an employe of the carrier is admissible in mitigation of damages only, but where a passenger's conduct toward an employe is knowingly proffered with the specific purpose of bringing about a difficulty, and which in its probable result brings about a difficulty, it is such wrong on the passenger's part as requires the classification of his conduct as contributory negligence, though it may not amount to absolute justification for the assault which follows, and a passenger guilty of such contributory negligence cannot recover for such assault.<sup>3</sup> A passenger in the caboose of a freight train who gets into controversy with a brakeman over certain bedding, claimed by the brakeman as his own, and who strikes the brakeman, cannot recover of the railroad company for injuries received in the ensuing fight.<sup>4</sup>

97. *Montgomery v. Colorado Springs & I. Ry. Co.*, 50 Col. 210, 114 Pac. 659.

98. *Harrell v. Columbia Elec. St. Ry. etc. Co.*, 89 S. C. 97, 71 S. E. 359.

99. *Reid v. Yazoo & M. V. R. Co.*, 94 Miss. 639, 47 So. 670.

1. *Tempfer v. Joplin & P. Ry. Co.*, (Kan.), 131 Pac. 592.

2. *Carlisle v. Central of Ga. Ry. Co.* (Ala.), 62 So. 759.

3. *Missouri, etc., Ry. Co. of Texas v. Gerren* (Tex. Civ. App.), 121 S. W. 905.

4. *Arnold v. Atchison, etc., Ry. Co.*, 81 Kan. 530, 106 Pac. 42.

## CHAPTER XXX.

### DAMAGES.

- SECTION**
1. Compensation is the general rule as to measure of damages.
  2. Injury aggravated by passenger's negligence or imprudence.
  3. Injury aggravated by existing disease or injury.
  4. Damages for failure to carry.
  5. Damages for setting down passenger at place other than destination.
  6. Damages for ejection or assault of passenger.
  7. Damages for personal injuries.
  8. Mental suffering as distinct cause of action or element of damage.
  9. Exemplary damages.—Malice or wilfulness.
  10. Exemplary damages.—Gross negligence.
  11. Exemplary damages for carrier's acts.
  12. Exemplary damages for acts of servants.
  13. Elements affecting the amount of damages.
  14. Excessive or inadequate damages.

#### § 1. Compensation is the general rule as to measure of damages.

In an action for breach of contract the damages recoverable are only such as the parties may be reasonably supposed to have contemplated as a probable result from such breach, while the damages recoverable for a tort are not limited to such as the tortfeasor and person injured may have contemplated, but include all which naturally and proximately flow from the injury.<sup>1</sup> Non-feasance or the refusal or neglect to perform any duty on the part of a carrier, misfeasance or the negligent performance of any duty, or any breach of duty, have been generally held by the courts to furnish a ground of action in tort against the carrier, and, unless expressly brought on the contract, actions of this character

1. *Cowan v. Western Union Tel. Co.* (Iowa), 98 N. W. 281; *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 41 Am. Rep. 41; *Georgia R. Co. v. Hayden*, 71 Ga. 518, 51 Am. Rep. 274; *Montgomery, etc., R. Co. v. Boring*, 51 Ga. 582; *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Cobb v. Great Western R. Co.*, 1 Q. B. 459, 58 Am. & Eng. R. Cas. 169; *International, etc., R. Co. v. Harder* (Tex. Civ. App.), 81 S. W. 356.

are usually held to be action in tort, regardless of the form of the declaration, and the damages recoverable to be such as are recoverable in an action of tort.<sup>2</sup> Generally, the rule as to the measure of damages in actions of passengers against carriers for loss or injury occasioned by the carrier's negligence, or any breach of its general duty as a carrier, or for torts committed by the carrier through mistake, ignorance, or mere neglect, is that the passenger is entitled to compensatory damages or such damages as will fully or reasonably compensate him for the actual injury or loss sustained.<sup>3</sup> The carrier is liable for the natural and proximate dam-

2. Baltimore, etc., R. Co. v. Carr, 71 Md. 135; Evans v. St. Louis, etc., R. Co., 11 Mo. App. 463; Pittsburgh, etc., R. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517; New Orleans, etc., R. Co. v. Hurst, 36 Miss. 660, 74 Am. Dec. 785; Burnett v. Lynch, 5 B. & C. 589, 12 E. C. L. 327.

3. N. Y.—Parker v. Long Island R. Co., 13 Hun (N. Y.), 319; Morse v. Auburn, etc., R. Co., 10 Barb. (N. Y.) 625.

Cal.—Sloane v. Southern California R. Co., 111 Cal. 668; Morgan v. Southern Pac. R. Co., 95 Cal. 501, 29 Am. St. Rep. 143.

Colo.—Wall v. Cameron, 6 Colo. 275.

Del.—Wallace v. Wilmington, etc., R. Co., 8 Houst. (Del.) 529.

Ga.—Goins v. Western R. Co., 68 Ga. 190; Hughes v. Western R. Co., 61 Ga. 131.

Ill.—Illinois Cent. R. Co. v. Nelson, 59 Ill. 110.

Ky.—Louisville, etc., R. Co. v. Wilsey (Ky.), 12 S. W. 275, 39 Am. & Eng. R. Cas. 418.

La.—Hill v. New Orleans, etc., R. Co., 11 La. Ann. 292.

Md.—Philadelphia, etc., R. Co. v. Hoeflich, 62 Md. 300, 50 Am. Rep. 223.

Miss.—Chicago, etc., R. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373; Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Dorrah v. Illinois Cent. R. Co., 65 Miss. 14, 7 Am. St. Rep. 629.

Mo.—Trigg v. St. Louis, etc., R. Co., 74 Mo. 147, 14 Am. Rep. 305, 6 Am. & Eng. R. Cas. 345.

Nev.—Quigley v. Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757; Johnson v. Wells, 6 Nev. 224, 3 Am. Rep. 245.

N. C.—Wallace v. Western North Carolina R. Co., 104 N. C. 442.

Pa.—Pittsburgh, etc., R. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517; Pennsylvania R. Co. v. Books, 57 Pa. St. 339, 98 Am. Dec. 229.

Tenn.—Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.), 128.

Tex.—Texas, etc., R. Co. v. Pollard, 2 Tex. App. Civ. Cas. § 481.

Wis.—Spicer v. Chicago, etc., R. Co., 29 Wis. 580.

Wyo.—Union Pac. R. Co. v. Hause, 1 Wyo. 27.

ages resulting from its negligence, both direct and consequential, but the damages must be certain, both in their nature, and as to the cause from which they proceed.<sup>4</sup> For example, if one of the passenger's limbs are broken, he may recover for the expenses of the sickness occasioned, and for the consequent loss of time, and also compensation for the bodily pain and suffering caused by such injury.<sup>5</sup> And where a passenger, by reason of the carrier's failure to carry him as agreed, was detained in an unhealthy place, by reason of which he became sick after his return, he was held entitled to recover for his loss of health and loss of time, and his expenses during his sickness, and the expenses of his return home.<sup>6</sup> And where one was ejected from a street car, the compensatory damages was held to embrace loss of time, fare on another car, and injury to feelings because of indignities suffered.<sup>7</sup> But where the injury or loss is not the natural or probable consequences of the carrier's negligence, or the injury is not a direct result or natural concomitant of the wrongful act, or damages are produced by agencies other than those causing the injury, or by agencies remotely connected with those causing the injury, or are speculative or contingent, the damages sustained are too remote to

*U. S.*—Mackoy v. Missouri Pac. R. Co., 5 McCrary (U. S.), 538.

*Eng.*—Young v. Fewson, 8 C. & P. 55, 34 E. C. L. 289.

4. Gulf, etc., R. Co. v. Moore (Tex. Civ. App.), 83 S. W. 362; East Tennessee, etc., R. Co. v. Lockhart, 79 Ala. 315; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147, 62 Am. Dec. 323; Smith v. St. Paul, etc., R. Co., 30 Minn. 169, 9 Am. & Eng. R. Cas. 262.

5. Curtis v. Rochester, etc., R. Co., 18 N. Y. 534; Ransom v. New York, etc., R. Co., 15 N. Y. 415.

6. Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Weed v.

Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588; Texas, etc., R. Co. v. Mayes (Tex. App.), 15 S. W. 43. See also, Cincinnati, etc., R. Co. v. Eaton, 94 Ind. 474, 48 Am. Rep. 179; Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89; Smith v. St. Paul, etc., R. Co., 30 Minn. 169, 9 Am. & Eng. R. Cas. 262.

7. Jacobs v. Third Ave. R. Co., 71 App. Div. (N. Y.) 199, 10 N. Y. Ann. Cas. 462, 75 N. Y. Supp. 679; Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Ray v. Cortland, etc., R. Co., 19 App. Div. (N. Y.) 530, 46 N. Y. Supp. 521.

entitle a recovery against the carrier.<sup>8</sup> The New York courts have held that where the action is presented and tried as an action for breach of contract the plaintiff is entitled to recover substantial damages sufficient to make good the pecuniary loss which he has actually suffered by reason of such breach of contract, but not damages for mere inconvenience, annoyance, and delay, in the absence of proof of actual physical or mental injury, but the rule is otherwise when the action is one of tort.<sup>9</sup>

## § 2. Injury aggravated by passenger's negligence or imprudence.

A passenger, when injured, is bound by law to use ordinary care to render the injury no greater than necessary under the circumstances.<sup>10</sup> The carrier is liable to a passenger injured through its negligence for the damages sustained by the passenger at the time the injury was inflicted and for those directly and proximately resulting subsequently therefrom, but it is not liable for any aggravation of those injuries by the passenger's own acts, or for the damages resulting from such aggravation, or for conse-

8. Indianapolis, etc., R. Co. v. Birney, 71 Ill. 391; Alabama, etc., R. Co. v. Arnold, 80 Ala. 600; Georgia R. Co. v. Hayden, 71 Ga. 518, 51 Am. Rep. 274, loss of theatrical manager's engagement; Tamlin v. Great Northern R. Co., 1 H. & N. 408; Yonge v. Pacific Mail Steamship Co., 1 Cal. 353, loss of possible wages; Francis v. St. Louis Trans. Co., 5 Mo. App. 7; Trigg v. St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305; Hoffman v. Northern Pac. R. Co., 45 Minn. 53; McClary v. Sioux City, etc., R. Co., 3 Neb. 44, 19 Am. Rep. 631; Scheffer v. Washington City, etc., R. Co., 105 U. S. 249; Cobb v. Great Western R. Co., 1 Q. B. 459, 58 Am. & Eng. R. Cas. 169, loss from robbery on over-crowded train; Texas, etc., R. Co. v. Rea (Tex. Civ. App.), 65 S. W.

1115, damages for injury in holding child of another in an over-crowded train.

9. Miller v. Baltimore, etc., R. Co., 89 App. Div. (N. Y.) 457, 85 N. Y. Supp. 883; Miller v. King, 166 N. Y. 394, 59 N. E. 1114, 32 App. Div. (N. Y.) 339, 53 N. Y. Supp. 123, 21 App. Div. (N. Y.) 192, 47 N. Y. Supp. 534, 88 Hun (N. Y.), 181, 34 N. Y. Supp. 425, 84 Hun (N. Y.), 308, 32 N. Y. Supp. 332. See also, cases cited, note 7, *ante*.

10. Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, 50 Am. Rep. 601, 18 Am. & Eng. R. Cas. 87; Hannibal, etc., R. Co. v. Martin, 111 Ill. 219; Indianapolis, etc., R. Co. v. Birney, 71 Ill. 391; Klutts v. St. Louis, etc., R. Co., 75 Mo. 642; Le Blanche v. London, etc., R. Co., 1 C. P. Div. 286.



quences which were avoidable by care on the part of the passenger.<sup>11</sup> A passenger cannot recover for pain or suffering, either physical or mental, which he may have sustained by reason of his failure to use ordinary care in having himself treated or operated upon by physicians.<sup>12</sup> But where he has used ordinary care in the selection of a physician of ordinary skill, any injury or pain resulting from the manner in which the injury was treated or the operation performed is properly regarded as within and a part of the result of which the injury, occasioned by the negligence of the carrier, was the proximate cause, and the carrier liable therefor.<sup>13</sup> But the same rule has been applied in favor of the carrier and it has been held that the duty of a railway company assuming to furnish a surgeon to a passenger injured by a collision is discharged when it provides one possessing ordinary skill. Such surgeon is liable for any damage caused by his negligence.<sup>14</sup> A passenger cannot recover for injuries caused by his resistance to the conductor who lawfully ejected him,<sup>15</sup> or who unlawfully ejected him, unless the expulsion was malicious or wanton.<sup>16</sup>

### § 3. Injury aggravated by existing disease or injury.

Where an injury to a passenger resulting from the carrier's

11. *Benson v. New Jersey R., etc., Co.*, 9 Bosw. (N. Y.) 412; unreasonable expense incurred by a passenger who had been delayed; *Owens v. Baltimore, etc., R. Co.*, 35 Fed. 715; *Secord v. St. Paul, etc., R. Co.*, 5 McCrary (U. S.), 515; *Klutts v. St. Louis, etc., R. Co.*, *supra*, but aggravation of an injury, due to a cursory examination of the injured passenger by the carrier's surgeon, cannot be imputed to the passenger's negligence.

12. *Texas, etc., R. Co. v. White*, 101 Fed. 928, 42 C. C. A. 86.

13. *Hickenbottom v. Delaware, etc., R. Co.*, 122 N. Y. 91, competent to show that, after amputation of

plaintiff's arm, he experiences pain seemingly in the amputated member; *Pullman Palace Car Co. v. Bluhm*, *supra*, where the bones of a broken arm failed to unite, thereby making a false joint.

14. *Secord v. St. Paul, etc., R. Co.*, *supra*.

15. *Wright v. California Cent. R. Co.*, 78 Cal. 360.

16. *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238, 127 Ill. 419; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Chicago, etc., R. Co. v. Wilson*, 23 Ill. App. 63. But see *Louisville, etc., R. Co. v. Wolfe*, 123 Ind. 347, 25 Am. St. Rep. 436.

negligence, or physical or mental suffering caused thereby, is increased, intensified, or aggravated by the physical condition of the passenger or by an existing disease, or injury, the passenger is entitled to recover compensatory damages therefor, whether such fact was known to the carrier,<sup>17</sup> or was not known and could not have been foreseen by the carrier.<sup>18</sup> The carrier is presumed to know and to contemplate all the natural and proximate consequences, as well those that probably may, as those that certainly will, flow from its wrongful act, and, therefore, a predisposition or tendency of an injured passenger to certain diseases will not relieve the carrier from the consequences therefrom.<sup>19</sup> But it has been held that the increased risk arising from conditions of health affecting the fitness of a passenger to travel, certainly where such conditions are unknown to the carrier, must be assumed by the passenger.<sup>20</sup>

17. *Texas, etc., R. Co. v. Lynch* (Tex. Civ. App.), 73 S. W. 65.

18. *Fell v. Northern Pac. R. Co.*, 44 Fed. 248; *Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209; *East Tennessee, etc., R. Co. v. Lockhart*, 79 Ala. 315; *Louisville, etc., R. Co. v. Jones*, 83 Ala. 376; *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533; *Louisville, etc., R. Co. v. Snyder*, 117 Ind. 435; 10 Am. St. Rep. 60; *Ohio, etc., R. Co. v. Hecht*, 115 Ind. 443; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544; *Dawson v. Louisville, etc., R. Co. (Ky.)*, 11 Am. & Eng. R. Ca. 134; *Brown v. Hannibal, etc., R. Co.*, 66 Mo. 588.

Damages for a miscarriage and the suffering incident thereto have been held proper where a pregnant woman was put off the cars at a place other than her destination and compelled to walk home, the walk and exposure re-

sulting in a miscarriage. *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 41 Am. Rep. 41; *Augusta, etc., R. Co. v. Randall*, 79 Ga. 304, 34 Am. & Eng. R. Cas. 439.

19. *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74, 47 Am. Rep. 381; *Sloane v. Southern California R. Co.*, 111 Cal. 668; *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529.

20. *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89, and where a sleeping car caught fire through the carrier's negligence, and a woman who was "unwell" was thereby compelled to leave the car half clad, and caught cold, resulting in the suppression of her menses, this was held to be a remote and not the proximate result of the carrier's negligence, and not to be considered in reckoning the damages.

#### § 4. Damages for failure to carry.

The measure of damages for the failure or refusal of a carrier to carry a passenger, or for delay in carrying a passenger, is, ordinarily, the necessarily increased expenses while awaiting the arrival of the conveyance, the expense of reaching his destination by another means, and the loss or injury actually sustained in his business as the direct and necessary consequences of the failure to carry or delay in carrying.<sup>21</sup> Loss of time,<sup>22</sup> or earnings,<sup>23</sup> per-

21. *Schmidt v. Cleveland, etc., R. Co.*, 25 Ky. L. Rep. 11, 74 S. W. 674; *Indianapolis, etc., R. Co. v. Birney*, 71 Ill. 391; *Morse v. Duncan*, 14 Fed. 396; *The Zenobia*, Abb. Adm. 80; *Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 35 Am. St. Rep. 422, 52 Am. & Eng. R. Cas. 176; *Baltimore, etc., R. Co. v. Carr*, 71 Md. 135; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408, 2 Jur. N. S. 1122, 26 L. J. Exch. 20; *Cranston v. Marshall*, 5 Exch. 395.

**Special instances.**—The sale of a passage ticket, by a certain steamer, does not constitute an agreement to carry a person buying such ticket unconditionally and at all hazards, but only gives him a right to passage on that steamer; and if, at the time of such sale, and unknown to both parties to the transaction, the steamer had been lost at sea, the holder of the ticket can recover only the amount he paid for the same, with interest, there being no obligation on the part of the carrier to provide substitute passage. *Bonsteel v. Vanderbilt*, 21 Barb. (N. Y.) 26; *Briggs v. Vanderbilt*, 19 Barb. (N. Y.) 346.

But where passage was guaranteed and the passenger had taken part of

the trip, if there were other routes open, the passenger might recover the cost of reaching his destination by the other route, including reasonable pay for delay and special damages sustained by reason of the delay; or, if there was no other route open, the measure of damages would be the expenses back, expenses while at the place where his trip was interrupted, necessary expenses on the road, and loss of time in making the passage there and back. *Central R. Co. v. Combs*, 70 Ga. 533, 18 Am. & Eng. R. Cas. 298.

22. *Cooley v. Pennsylvania R. Co.*, 40 Misc. Rep. (N. Y.) 239, 81 N. Y. Supp. 692; *Mobile & O. R. Co. v. Reeves*, 25 Ky. L. Rep. 2236; 80 S. W. 471; *Miller v. Southern Ry. Co.*, 69 S. C. 116, 48 S. W. 99, but a passenger is not entitled to damages for inconvenience, loss of time, or fatigue caused by the delay of a train, unless it has produced some pecuniary damages or personal loss resulting. See also, *Bullock v. White Star S. Co.*, 30 Wash. 448, 70 Pac. 1106.

A lawyer can recover merely the value of his time, based on the average of his earnings for the year preceding, in the absence of notice to the carrier of special circumstances

sonal inconvenience,<sup>24</sup> and sickness resulting proximately from the carrier's negligence,<sup>25</sup> and suffering from being compelled to remain over night in an unheated and unlighted station<sup>26</sup> have also been held to be elements of damage for failure or delay in carriage. Inconvenience is an element when capable of being stated in a tangible form and assessed at a money value.<sup>27</sup> But disappointment occasioned by the delay or failure to reach destination has been held not to be a proper element of damage, at least in an action for breach of contract,<sup>28</sup> although damages for disappointment, sense of wrong, or injured feelings might be recoverable in an action of tort.<sup>29</sup> Where the engineer and fireman in charge of

requiring him to arrive on schedule time. *Cooley v. Pennsylvania R. Co.*, *supra*.

23. *Stewart v. Baltimore & O. R. Co.*, 88 N. Y. Supp. 377, where a passenger suffered no loss of earnings, by reason of three hours' delay, caused by his ticket having been taken away and not returned, and incurred no expense to which he would not have been put had he reached his destination, he was not entitled to any damages except the price of the ticket.

Cost of price of ticket has been held the only proximate damages for breach of contract of carrier in *De Leon v. McKernan*, 25 Misc. Rep. (N. Y.) 182, 54 N. Y. Supp. 167, delay in delivery of a passenger's trunk; *Rose v. King*, 76 App. Div. (N. Y.) 308, 78 N. Y. Supp. 419, the complaint not having asked for special damages, and no circumstances of humiliation or indignity having been shown; *Miller v. Baltimore, etc., R. Co.*, 89 App. Div. (N. Y.) 457, 85 N. Y. Supp. 883, not entitled to recover for mere inconvenience, annoyance, and delay, in the absence of proof of actual physical or mental injury.

Living expenses, wages, and cost of outfit for plaintiff and his workmen, held proper elements of damages. *Bullock v. White Star S. S. Co.*, 30 Wash. 448, 70 Pac. 1106.

24. *Mobile, etc., R. Co. v. Reeves*, *supra*; *Southern Ry. Co. v. Marshall*, 23 Ky. L. Rep. 813, 64 S. W. 418.

25. *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588. But not when caused by the passenger's negligence or imprudence. *Morse v. Duncan*, 14 Fed. 396; *Indianapolis, etc., R. Co. v. Birney*, 71 Ill. 391; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7.

26. *Brown v. Georgia, etc., R. Co.*, 119 Ga. 88, 46 S. E. 71.

27. *Northern Cent. R. Co. v. O'Conner*, *supra*; *Baltimore, etc., R. Co. v. Carr*, *supra*; *St. Louis, etc., R. Co. v. Berry*, 4 Tex. App. Civ. Cas., § 166.

28. *Bonsteel v. Vanderbilt*, *supra*; *Briggs v. Vanderbilt*, *supra*. But see *St. Louis, etc., R. Co. v. Berry*, *supra*, holding that damages for annoyance, vexation, and trouble occasioned by delay are recoverable.

29. *Walsh v. Chicago, etc., R. Co.*,

a train, through no fault of their own, fail to see or obey a signal to stop at a flag station, the company will not be liable for failure to stop the train; while, if they fail to see the signal because of negligence on their part, the person damaged is entitled to recover compensatory damages; and if the signal is seen and understood by them, and their action in not stopping the train is malicious, wanton, or capricious, then punitive damages may be recovered.<sup>30</sup>

### § 5. Damages for setting down passenger at place other than destination.

Where in violation of the carrier's contract, a passenger has been set down by the carrier before reaching his destination, he may recover for the inconvenience of having to walk to his destination,<sup>31</sup> or the cost of conveyance to his destination by another means,<sup>32</sup> and for sickness resulting from having to walk to his destination.<sup>33</sup> But where he has been carried beyond his destination, the carrier is responsible in damages for the discomfort and inconvenience in getting back to his destination,<sup>34</sup> for sickness resulting from walking back where unable to procure a conveyance and acting with care and prudence,<sup>35</sup> for any personal in-

42 Wis. 23, 24 Am. Rep. 376, 15 Am. Ry. Rep. 71. Or for mental anguish suffered by a wife's being separated from her children because of failure of the train to stop long enough for her to board it. *International, etc., R. Co. v. Anchonda* (Tex. Civ. App.), 68 S. W. 743.

30. *Southern R. Co. v. Lanning* (Miss.), 35 So. 417; *Southern R. Co. v. White* (Miss.), 33 So. 970; *Yazoo, etc., R. Co. v. Faust* (Miss.), 32 So. 9.

31. *Walsh v. Chicago, etc., R. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Hobbs v. London, etc., R. Co.*, L. R. 10 Q. B. 111.

32. *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7.

33. *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 41 Am. Rep. 41.

34. *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17; *East Tennessee, etc., R. Co. v. Lockhart*, 79 Ala. 315; *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Trigg v. St. Louis, etc., R. Co.*, 74 Mo. 147, 41 Am. Rep. 305, 6 Am. & Eng. R. Cas. 345; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323.

35. *Cincinnati, etc., R. Co. v. Eaton*, *supra*; *East Tennessee, etc., R. Co. v. Lockhart*, *supra*; *Mobile, etc., R. Co. v. McArthur*, 43 Miss. 180; *International, etc., R. Co. v. Terry*, 62 Tex. 380, 50 Am. Rep. 529.

jury sustained by reason of dangers encountered in walking to his destination known to the carrier, and the proximate result of the carrier's wrong, and not attributable to his own negligence or other independent cause,<sup>36</sup> and for the expenses of conveyance and other charges shown to have been the direct, natural, and proximate result of the breach of contract.<sup>37</sup> But no recovery can be had for mental suffering unaccompanied by physical injury.<sup>38</sup> Some of the cases hold that damages for fright is recoverable;<sup>39</sup> others that they are not.<sup>40</sup>

## § 6. Damages for ejection or assault of passenger.

Where a passenger has been wrongfully and unlawfully expelled or ejected by the carrier from a train or car, he may recover in an action against the carrier the amount of the fare to the place

But the carrier is not liable for sickness resulting from the passenger's own negligence or imprudence in walking without first trying to find shelter, or where the walk was unnecessarily taken. *Ohio, etc., R. Co. v. Burrows*, 32 Ill. App. 161; *Gulf, etc., R. Co. v. Head* (Tex. Civ. App.), 15 S. W. 504; *Texas, etc., R. Co. v. Cole*, 66 Tex. 562.

36. *Rawlings v. Wabash R. Co.*, 97 Mo. App. 515, 71 S. W. 535; *Evans v. St. Louis, etc., R. Co.*, 11 Mo. App. 463; *Winkler v. St. Louis, etc., R. Co.*, 21 Mo. App. 99; *Kreuziger v. Chicago, etc., R. Co.*, 73 Wis. 158; *Stutz v. Chicago, etc., R. Co.*, 73 Wis. 147, 9 Am. St. Rep. 769.

But the carrier is not liable for injury caused by the passenger's own negligence or imprudence. *Lewis v. Flint, etc., R. Co.*, 54 Mich. 55, 52 Am. Rep. 790; *Henry v. St. Louis, etc., R. Co.*, 76 Mo. 288, 43 Am. Rep. 762.

37. *International, etc., R. Co. v.*

*Terry*, 62 Tex. 380, 50 Am. Rep. 529, 21 Am. & Eng. R. Cas. 323; *Alabama G. S. R. Co. v. Sellers*, *supra*.

38. *Kansas City, etc., R. Co. v. Dalton*, 65 Kan. 661, 70 Pac. 645; *Trigg v. St. Louis, etc., R. Co.*, 74 Mo. 147, 41 Am. Rep. 305, 6 Am. & Eng. R. Cas. 345; *Dorrah v. Illinois Cent. R. Co.*, 65 Miss. 14, 7 Am. St. Rep. 629, 30 Am. & Eng. R. Cas. 576.

39. *East Tennessee, etc., R. Co. v. Lockhart*, 79 Ala. 315; *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 474, where the fright was directly produced by the wrongful act.

40. *Rawlings v. Wabash R. Co.*, 97 Mo. App. 511, 71 S. W. 534, damages for sickness owing to having fallen down in the mud and become wet and frightened held not recoverable; *Georgia R. Co. v. Dorsey*, 116 Ga. 719, 42 S. E. 1024, fright from hearing loud voices not recoverable unless the locality was known to the carrier to be one in which such occasion of fright was likely to occur.

to which he was entitled to be carried, damages for the loss of time occasioned by the delay, and any other pecuniary loss necessarily caused thereby and proven to be a proximate result of the ejection, and a reasonable compensation for the indignity, humiliation, wounded pride, and mental suffering involved in and resulting from such wrongful expulsion.<sup>41</sup> He may recover for such indignity and humiliation, whether the act was wanton, malicious, or willful, or merely negligent or mistaken;<sup>42</sup> whether forcibly ejected,<sup>43</sup> or forced to leave because of threatened violence;<sup>44</sup> or

41. *Kansas City, etc., R. Co. v. Little*, 66 Kan. 378, 71 Pac. 820, 61 L. R. A. 122; *Choctaw, etc., R. Co. v. Hill* (Tenn.), 75 S. W. 963; *Pennsylvania R. Co. v. Connell*, 127 Ill. 419, 112 Ill. 295, 54 Am. Rep. 238; *Delaware, etc., R. Co. v. Waleh*, 47 N. J. L. 548; *Allen v. Camden, etc., Ferry Co.*, 46 N. J. L. 198; *Baltimore, etc., Turnpike Road v. Boone*, 45 Md. 344; *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399; *Willson v. Northern Pac. R. Co.*, 5 Wash. 621. But see *Gorman v. Southern Pac. R. Co.*, 93 Cal. 1, 33 Am. St. Rep. 157, holding that compensatory damages for indignity and humiliation are only recoverable where the expulsion is accompanied by undue violence, or by insult and abuse. See also N. Y. cases, note 7, § 1, *ante*.

**Loss of time.**—Proof in a passenger's action for wrongful expulsion that he was a lawyer of prominence, that his time was of value, and that he lost one day, there being no proof as to what the value of his time was, is insufficient to warrant the jury to award damages for loss of time. *Pennsylvania Co. v. Scofield*, 121 Fed. 814, 58 C. C. A. 176; *Gulf, etc., R.*

*Co. v. Daniels* (Tex. Civ. App.), 29 S. W. 426.

42. *Coine v. Chicago, etc., R. Co.*, 123 Iowa, 458, 99 N. W. 134; *St. Louis, etc., R. Co. v. Trimble*, 54 Ark. 354; *Lake Erie, etc., R. Co. v. Christison*, 30 Ill. App. 495; *Toledo, etc., R. Co. v. Kid*, 29 Ill. App. 353; *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Chicago, etc., R. Co. v. Holdridge*, 118 Ind. 281; *Louisville, etc., R. Co. v. Wilsey* (Ky.), 12 S. W. 275, 39 Am. & Eng. R. Cas. 418; *Philadelphia, etc., R. Co. v. Hoeflich*, 62 Md. 300, 50 Am. Rep. 223; *Smith v. Pittsburgh, etc., R. Co.*, 23 Ohio St. 11. But see *Mallott v. Woods*, 109 Ill. App. 512, holding that a passenger required to leave a train at a station short of her destination, cannot recover for the humiliation and indignity, in the absence of proof of any actual malice or wantonness on the part of the conductor.

43. *Allen v. Camden, etc., Ferry Co.*, 46 N. J. L. 198; *Georgia R. Co. v. Olds*, 77 Ga. 673; *City, etc., R. Co. v. Brauss*, 70 Ga. 380.

44. *Delaware, etc., R. Co. v. Walsh*, 47 N. J. L. 548.

where he pays an illegally exacted fare to avoid ejection;<sup>45</sup> and although he may not have received any physical injury,<sup>46</sup> or suffered any pecuniary loss.<sup>47</sup> The passenger may also recover for any personal injury and consequent physical pain and suffering, though slight, and mental distress naturally resulting from the wrongful ejection,<sup>48</sup> and for inconvenience,<sup>49</sup> annoyances, vexation and risk, to which he may have been subjected by reason of being compelled to walk to another station or place.<sup>50</sup> But he cannot recover for injuries caused by his forcible resistance to the efforts to eject him, unless the ejection is malicious or wanton.<sup>51</sup> If, in

45. *Pennsylvania Co. v. Bray*, 125 Ind. 229; *Chicago, etc., R. Co. v. Conley*, 6 Ind. App. 9; *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53; *Willson v. Northern Pac. R. Co.*, 5 Wash. 621.

46. *Georgia R., etc., Co. v. Baker*, 120 Ga. 991, 48 S. E. 355; *Chicago, etc., R. Co. v. Chisholm*, 79 Ill. 584; *Missouri, etc., R. Co. v. Tarwater* (Tex. Civ. App.), 75 S. W. 937; *Mabry v. City Electric R. Co.*, 116 Ga. 624, 42 S. E. 1025, 59 L. R. A. 590.

47. *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133.

Evidence of abusive and insulting conduct and contemptuous manner of the carrier's servants while unlawfully expelling a passenger is admissible to enhance the damages. *Sloane v. Southern California R. Co.*, 111 Cal. 668; *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641; *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399; *Toledo, etc., R. Co. v. McDonough*, 53 Md. 289; *International, etc., R. Co. v. Gilbert*, 64 Tex. 536; *Coppin v. Braithwaite*, 8 Jur. 875.

The honest expression of opinion, however, by a conductor that money

offered to him for fare is counterfeit, and his refusal to accept it on that account, he not charging that the passenger knew it was counterfeit, is not a tort, or an element of damages. *Breen v. St. Louis Transit Co.*, 102 Mo. App. 479.

48. *Breen v. St. Louis Transit Co.*, 102 Mo. App. 479, 77 S. W. 78; *Houston, etc., R. Co. v. McNeel* (Tex. Civ. App.), 76 S. W. 206; *Smith v. Pittsburg, etc., R. Co.*, 23 Ohio St. 11, injurious consequences of exposure held to be a proper element of damages. See also, *Sloane v. Southern California R. Co.*, 111 Cal. 668; *Ohio, etc., R. Co. v. Burrow*, 32 Ill. App. 161; *Evans v. St. Louis, etc., R. Co.*, 11 Mo. App. 463; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.), 128; *International, etc., R. Co. v. Gilbert*, 64 Tex. 541.

49. *Central R., etc., Co. v. Strickland*, 90 Ga. 562; *Georgia R. Co. v. Olds*, 77 Ga. 673; *City, etc., R. Co. v. Brauss*, 70 Ga. 380.

50. *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *New York, etc., R. Co. v. Willing*, 24 Ohio Cir. Ct. Rep. 74.

51. *Pennsylvania R. Co. v. Connell*,



lawfully ejecting a passenger, unnecessary force or violence is used,<sup>52</sup> or if the ejection is made at an improper time, as from a moving train,<sup>53</sup> or at any improper place instead of a regular station,<sup>54</sup> the carrier will be liable for damages resulting therefrom, including compensation for the mortification and indignity suffered.<sup>55</sup> A passenger illegally arrested by the carrier's servants,<sup>56</sup> or wrongfully assaulted by the carrier's servants,<sup>57</sup> or by fellow passengers in the presence of the employes of the carrier and without interference by them to protect him,<sup>58</sup> may recover of the carrier for the physical injury inflicted, pain and suffering, and for the mental suffering and disgrace and humiliation to which he was subjected by the arrest or assault. Compensatory damages, which may be recovered for the wrongful act of a conductor in expelling a passenger, are not subject to mitigation, nor is the liability of the principal for such damages defeated, by proof that the act which caused the injury was provoked by abusive language. In an action for wrongful ejection and assault on a passenger.

112 Ill. 295, 54 Am. Rep. 238, 127 Ill. 419; Chicago, etc., R. Co. v. Griffin, 68 Ill. 499; Chicago, etc., R. Co. v. Wilson, 23 Ill. App. 63. *Contra*: Louisville, etc., R. Co. v. Wolfe, 128 Ind. 347, 25 Am. St. Rep. 436.

52. *Jardine v. Cornell*, 50 N. J. L. 485; Philadelphia, etc., R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442; *Mykleby v. Chicago, etc., R. Co.*, 39 Minn. 54; *Brown v. Hannibal, etc., R. Co.*, 66 Mo. 588; *Chicago, etc., R. Co. v. Herring*, 57 Ill. 59.

53. *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343, 80 Am. Dec. 286.

54. *Toledo, etc., R. Co. v. Patterson*, 63 Ill. 304.

55. *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442.

56. *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101; *Fisher v. Metropolitan Elev. R. Co.*, 34 Hun (N. Y.), 433.

57. *Niendorf v. Manhattan R. Co.*, 4 App. Div. (N. Y.) 46; *East Tennessee, etc., R. Co. v. Hyde*, 89 Ga. 721; *Sherley v. Billings*, 8 Bush (Ky.), 147, 8 Am. Rep. 451; *Randolph v. Hannibal, etc., R. Co.*, 18 Mo. App. 609; *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657; *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634; *O'Donnel v. St. Louis Transit Co.* (Mo. App.), 80 S. W. 315.

58. *International, etc., R. Co. v. Giesen* (Tex. Civ. App.), 69 S. W. 653; *Richmond, etc., R. Co. v. Jefferson*, 89 Ga. 554; *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689.

words of provocation may be considered in mitigation of punitive, but not of compensatory damages.<sup>59</sup> But only actual damages and nothing for wounded feelings or pain of mind, can be recovered by a passenger where he enters a car or train for the purpose of being ejected in order to bring an action for damages.<sup>60</sup>

## § 7. Damages for personal injuries.

Damages for personal injuries sustained by a passenger through the negligence of a carrier should consist of reasonable compensation for the injuries received, the sufferings experienced, and the consequent loss sustained by the passenger.<sup>61</sup> Not only the direct pecuniary expenses incurred by the injured person, and loss of time, the bodily and mental suffering, expense of cure, and incurable hurt caused by the injury, but also such future damages as may result from the loss of health, time, and use of limbs, bodily and mental pain and suffering, having in view the effect of the injury upon his ability to labor and attend to his business, are proper elements of damage for the consideration of the jury.<sup>62</sup> Loss of time after the injury during which the pas-

59. *Mahoning Valley R. Co. v. De Pascale*, 70 Ohio St. 179, 71 N. E. 633. But see *Harrison v. Fink*, 42 Fed. 787, holding that a passenger could not recover for a conductor's acts or words in ejecting him, having provoked them by resisting the ejection. Also *Terre Haute, etc., R. Co. v. Vanatta*, 21 Ill. 188, 74 Am. Dec. 96, holding that a passenger's attempt to impose upon a carrier by offering a void ticket may be shown to mitigate damages. See also, *Houston, etc., R. Co. v. Batchler* (Tex. Civ. App.), 73 S. W. 981.

60. *St. Louis, etc., R. Co. v. Trimble*, 54 Ark. 354; *Cincinnati, etc., R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729; *Holmes v. Carolina Cent.*

*R. Co.*, 94 N. C. 318, 26 Am. & Eng. R. Cas. 190.

61. *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Morse v. Auburn, etc., R. Co.*, 10 Barb. (N. Y.) 621; *Storrs v. Los Angeles Tract. Co.*, 134 Cal. 91, 66 Pac. 72; *Railroad v. Myers*, 87 Fed. 149, 58 U. S. App. 131, 32 C. C. A. 19; *Rutherford v. Shreveport, etc., R. Co.*, 41 La. Ann. 893, 41 Am. & Eng. R. Cas. 129; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Ohio, etc., R. Co. v. Dickerson*, 59 Ind. 317; *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529; *International, etc., R. Co. v. Irvine* (Tex.), 18 Am. & Eng. R. Cas. 294.

62. *Curtis v. Rochester, etc., R. Co.*,

senger is disabled from attending to his business or profession as well as actual and reasonable expenses for medical attendance, medicines and nursing are recoverable.<sup>63</sup> Although no precise and accurate estimate of physical and mental suffering is possible, the jury may allow such an amount as, in the exercise of a sound discretion, they deem reasonable for the physical pain, and mental suffering accompanying and resulting from such physical pain, which are the proximate results of the injury caused by the negligence of the carrier.<sup>64</sup> Damages are allowable for

18 N. Y. 534, 20 Barb. (N. Y.) 282; *Brignoli v. Chicago, etc., R. Co.*, 4 Daly (N. Y.), 182; *The Oriflame*, 3 Sawy. (U. S.) 397; *Secord v. St. Paul, etc., R. Co.*, 5 McCrary (U. S.), 515, 18 Fed. 221; *Mackoy v. Missouri Pac. R. Co.*, 5 McCrary (U. S.), 538; *Seymour v. Chicago, etc., R. Co.*, 3 Biss. (U. S.) 43; *Wall v. Cameron*, 6 Colo. 275; *St. Louis, etc., R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105, 3 Am. & Eng. R. Cas. 198; *Hill v. New Orleans, etc., R. Co.*, 11 La. Ann. 292; *Klutts v. St. Louis, etc., R. Co.*, 75 Mo. 642; *Whalen v. St. Louis, etc., R. Co.*, 60 Mo. 323, 9 Am. Ry. Rep. 224; *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533; *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *Texas, etc., R. Co. v. Pollard*, 2 Tex. App. Civ. Cas., § 424; *Spicer v. Chicago, etc., R. Co.*, 29 Wis. 580; *Southern Kansas R. Co. v. Walsh*, 45 Kan. 653; *Wallace v. Western North Carolina R. Co.*, 104 N. C. 442; *Phillips v. London, etc., R. Co.*, 5 Q. B. Div. 78.

63. See cases cited in preceding notes to this section. Also *Pennsylvania Co. v. Marion*, 104 Ind. 239, recovery for nursing although gratuitous allowed; *Hopkins v. Atlantic,*

*etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287, husband may recover for past and prospective loss of wife's services and expenses of medical treatment; *Ohio, etc., R. Co. v. Crosby*, 107 Ind. 32, but wife cannot so recover in absence of circumstances to rebut presumption of husband's right; *Ohio, etc., R. Co. v. Dickerson*, 59 Ind. 317; *Missouri Pac. R. Co. v. Jarrard*, 65 Tex. 560, actual deduction from salary for time lost not essential; *Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209, no recovery for loss of time unless compensation was in fact stopped or diminished; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 23 Am. St. Rep. 345, loss of time and loss of wages are the same; *Galveston, etc., R. Co. v. Thornsberry (Tex.)*, 17 S. W. 521, amount of expenses for medical treatment and value of loss of time must be shown.

64. *Hickenbottom v. Delaware, etc., R. Co.*, 122 N. Y. 91; *Ransom v. New York, etc., R. Co.*, 15 N. Y. 415; *Harding v. New York Cent., etc., R. Co.*, 36 Hun (N. Y.), 72; *Quinn v. Long Island R. Co.*, 34 Hun (N. Y.), 331; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Morgan v. Southern Pac. R. Co.*, 95 Cal. 501, 29 Am. St.

future or prospective, as well as past, physical and mental suffering and loss of time, and other pecuniary loss,<sup>65</sup> but such damages must be such as are reasonably certain to result,<sup>66</sup> and not such as may possibly result.<sup>67</sup> A passenger is entitled to recover compensation for permanent injuries caused by the carrier's negligence, or such as are reasonably certain to prove so, as well as for temporary injuries, and to compensation for pain and suffering and for loss sustained by reason of such permanent injuries or disabilities.<sup>68</sup> Included in permanent injuries are permanent reduction of the power or ability or diminished capacity to earn money,<sup>69</sup> inability to perform work,<sup>70</sup> or to continue professional

Rep. 143; Hannibal, etc., R. Co. v. Martin, 111 Ill. 219; Illinois Cent. R. Co. v. Robinson, 58 Ill. App. 181; Toledo, etc., R. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71; Dawson v. Louisville, etc., R. Co. (Ky.), 11 Am. & Eng. R. Cas. 134; Quigley v. Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757; Pennsylvania, etc., R. Co. v. Allen, 53 Pa. St. 276; International, etc., R. Co. v. Kentle, 2 Tex. App. Civ. Cas., § 303, 10 Am. & Eng. R. Cas. 337. See also cases generally cited in preceding notes to this section.

65. Nash v. Sharp, 19 Hun (N. Y.), 365; Matteson v. New York Cent. R. Co., 62 Barb. (N. Y.) 364; Washington, etc., R. Co. v. Harmon, 147 U. S. 571; Johnson v. Northern Pac. R. Co., 47 Minn. 430; Stutz v. Chicago, etc., R. Co., 73 Wis. 147, 9 Am. Rep. 769. See also cases cited in notes 62 and 63. *ante*.

66. Diefenbach v. New York, etc., R. Co., 5 App. Div. (N. Y.) 91, 38 N. Y. Supp. 788; Koetter v. Manhattan R. Co., 13 N. Y. Supp. 458; Curtis v. Rochester, etc., R. Co., 18 N. Y.

534; Washington, etc., R. Co. v. Harmon, 147 U. S. 571; Louisville, etc., R. Co. v. Wood, 113 Ind. 544; Louisville, etc., R. Co. v. Minogue, 90 Ky. 369, 29 Am. St. Rep. 378; Stutz v. Chicago, etc., R. Co., 73 Wis. 147, 9 Am. St. Rep. 769; Spicer v. Chicago, etc., R. Co., 29 Wis. 580.

67. Stroh v. New York, etc., R. Co., 96 N. Y. 305; Ohio, etc., R. Co. v. Wood, 107 Ind. 32.

68. Dale v. Brooklyn City, etc., R. Co., 1 Hun (N. Y.), 146; Southern Pac. R. Co. v. Rauh, 49 Fed. 696; Frink v. Schroyer, 18 Ill. 416; Louisville, etc., R. Co. v. Miller, 141 Ind. 533; Maysville, etc., R. Co. v. Herriek, 13 Bush. (Ky.) 122; Louisville, etc., R. Co. v. Thompson, 64 Miss. 584, 30 Am. & Eng. R. Cas. 541; Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; International, etc., R. Co. v. Brazzil, 78 Tex. 314, 44 Am. & Eng. R. Cas. 437; Farish v. Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666; Quaife v. Chicago, etc., R. Co., 48 Wis. 513, 33 Am. Rep. 821.

69. Hegeman v. Western R. Corp., 16 Barb. (N. Y.) 353; Mooney v.

practice,<sup>71</sup> disfigurement,<sup>72</sup> impairment of mental faculties,<sup>73</sup> diminished capacity for mental and physical development,<sup>74</sup> injuries rendering one a physical wreck and hopeless invalid, incapacitated to enjoy the pleasures of life, whether or not a wage earner.<sup>75</sup> The rule is well settled that the plaintiff can only be allowed to recover for such permanent injuries as in the ordinary course of nature, are reasonably certain to ensue. Expert witnesses may state what, in their judgment, is reasonably certain to be the future course of the disability, considering the nature of the injury, the extent, rapidity or slowness of the recovery, the constitution of the man, and all those other conditions upon which a judgment of a physician is ordinarily based. It is then for the jury upon that testimony, in connection with the physical condition of the plaintiff, to say whether a permanent disability is reasonably certain to ensue, and, if not so, then how long it is probable that

Hudson River R. Co., 1 Sweeny (N. Y.) 325; Lowry v. Mt. Adams, etc., R. Co., 68 Fed. 827; Boyce v. California Stage Co., 25 Cal. 460; Wall v. Cameron, 6 Colo. 275; North Chicago St. R. Co. v. Broms, 62 Ill. App. 127; Chicago, etc., R. Co. v. Meech, 59 Ill. App. 69; Louisville, etc., R. Co. v. Miller, *supra*; Pittsburg, etc., R. Co. v. Andrews, 39 Md. 329, 17 Am. Rep. 568, 10 Am. Ry. Rep. 485; Whalen v. St. Louis, etc., R. Co., *supra*; Wedekind v. Southern Pac. R. Co., 20 Nev. 292; Houston, etc., R. Co. v. Boehm, 57 Tex. 152, 9 Am. & Eng. R. Cas. 366; Sears v. Seattle Consol. St. R. Co., 6 Wash. 227; Cogsville v. West St., etc., Elec. R. Co., 5 Wash. 46.

70. Stutz v. Chicago, etc., R. Co., 73 Wis. 147, 9 Am. St. Rep. 769, 37 Am. & Eng. R. Cas. 137.

71. Walker v. Erie R. Co., 63 Barb. (N. Y.) 260; Phillips v. London, etc.,

R. Co., 5 C. P. Div. 280, 49 L. J. C. P. Div. 233, 42 L. T. N. S. 6.

72. Heddles v. Railroad Co., 77 Wis. 228, 46 N. W. 115; The Oriflamme, 3 Sawy. (U. S.) 397; Texas, etc., R. Co. v. Pollard, 2 Tex. App. Civ. Cas., § 481.

73. Toledo, etc., R. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

74. Houston, etc., R. Co. v. Boehm, 57 Tex. 152.

75. Tuthill v. Long Island R. Co., 81 Hun (N. Y.), 616, 30 N. Y. Supp. 959; Koetter v. Manhattan R. Co., 13 N. Y. Supp. 458; The Washington, 9 Wall. (U. S.) 513; Howland v. Oakland Consol. St. R. Co., 110 Cal. 513; Illinois Cent. R. Co. v. Robinson, 58 Ill. App. 181; Southern Kansas R. Co. v. Walsh, 45 Kan. 653; Olson v. St. Paul, etc., R. Co., 45 Minn. 536; 22 Am. St. Rep. 749; Missouri Pac. R. Co. v. Mitchell, 72 Tex. 171.

the plaintiff will suffer from the injuries, and to award the amount of damages necessary to compensate him for his future suffering.<sup>76</sup> But evidence of experts as to future consequences which are contingent, speculative, or merely possible, is incompetent.<sup>77</sup> Where the proximate cause of a disease was an injury received in an accident, or there is a progressive, complete connection between any disease and the injury inflicted, such disease may be taken into consideration by the jury as an element of damages for which a recovery may be had, even though it was not discovered until some time after the accident.<sup>78</sup>

### § 8. Mental suffering as distinct cause of action or element of damage.

Mental suffering or distress of mind, or injured feelings, when connected with bodily injury, are the subject of damages, but they must be connected in order to be included, unless the injury is accompanied by circumstances of malice, insult, or inhumanity.<sup>79</sup> There can be no recovery for fright which results in physical injuries or mental distress, in the absence of contemporaneous injury to plaintiff,<sup>80</sup> unless the fright is the proximate result of a

76. *Diffenbach v. New York, etc., R. Co.*, 5 App. Div. (N. Y.) 91, 38 N. Y. Supp. 788; *Clapp v. Hudson River R. Co.*, 19 Barb. (N. Y.) 461. And see *Louisville, etc., R. Co. v. Snyder*, 117 Ind. 435, 10 Am. St. Rep. 60; *Missouri Pac. R. Co. v. Aiken*, 71 Tex. 373; and the cases cited in notes 68, 69 and 73 to this section.

77. *Strohm v. New York, etc., R. Co.*, 96 N. Y. 305.

78. *Wood v. New York Cent., etc., R. Co.*, 83 App. Div. (N. Y.) 604, 82 N. Y. Supp. 160; *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74, 619, 48 Am. Rep. 134; *McGarrahan v. New York, etc., R. Co.*, 171 Mass. 211, 50

N. E. 610; *Dickson v. Hollister*, 123 Pa. 421, 16 Atl. 484; *Houston, etc., R. Co. v. Leslie*, 57 Tex. 83.

79. *Rawlings v. Wabash R. Co.*, 97 Mo. App. 515, 71 S. W. 535; *Morse v. Duncan*, 14 Fed. 396; *Dawson v. Louisville, etc., R. Co. (Ky.)*, 11 Am. & Eng. R. Cas. 134; *Dorrah v. Illinois Cent. R. Co.*, 65 Miss. 14, 7 Am. St. Rep. 629; *Spohn v. Missouri Pac. R. Co.*, 116 Mo. 617; *Trigg v. St. Louis, etc., R. Co.*, 74 Mo. 147, 41 Am. Rep. 305; *Winkler v. St. Louis, etc., R. Co.*, 21 Mo. App. 99; *Randolph v. Hannibal, etc., R. Co.*, 18 Mo. App. 609; *Johnson v. Wells*, 6 Nev. 224, 3 Am. Rep. 245.

80. *Ohliger v. Toledo Traction Co.*, 23 Ohio Cir. Ct. Rep. 65.

legal wrong against plaintiff by defendant.<sup>81</sup> But fright,<sup>82</sup> or terror,<sup>83</sup> or mental anguish caused by impending peril,<sup>84</sup> and mental suffering or nervous shock generally,<sup>85</sup> have been held to be proper elements of compensatory damages, whether connected with physical suffering or not, whenever they were the natural and proximate result of the wrong done, if such wrong gave the injured party a cause of action, though not of themselves a sufficient cause of action.

### § 9. Exemplary damages.—Malice or willfulness.

To authorize the giving of exemplary, punitive, or vindictive damages, it must appear that there was an intentional violation of another's rights, or a malicious intent to injure another in person or property, or that a proper act was done with an excess of force and violence, or that there was such a degree of negligence as indicates a wanton and reckless indifference to consequences.<sup>86</sup>

81. *Sanderson v. Northern Pac. R. Co.*, 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403.

82. *East Tennessee, etc., R. Co. v. Lockhart*, 79 Ala. 315; *Stutz v. Chicago, etc., R. Co.*, 73 Wis. 147, 9 Am. St. Rep. 769, 37 Am. & Eng. R. Cas. 187; *Kreuziger v. Chicago, etc., R. Co.*, 73 Wis. 158.

83. *Louisville, etc., R. Co. v. Whitman*, 79 Ala. 328.

84. *Harding v. New York, etc., R. Co.*, 36 Hun (N. Y.), 72; *Quinn v. Long Island R. Co.*, 34 Hun (N. Y.), 331; *Fell v. Northern Pac. R. Co.*, 44 Fed. 252; *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133.

85. *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347; *Shepard v. Chicago, etc., R. Co.*, 77 Iowa, 54; *Lake Erie, etc., R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Illinois Cent. R. Co. v. Latimer*, 28 Ill. App. 552;

*Southern Kansas R. Co. v. Hinsdale*, 38 Kan. 507; *Missouri Pac. R. Co. v. Kaiser*, 82 Tex. 144; *Stutz v. Chicago, etc., R. Co.*, 73 Wis. 147, 9 Am. St. Rep. 769.

86. *Peck v. New York Cent. R. Co.*, 6 Sup. Ct. (N. Y.) 409, note; *Parke v. Long Island R. Co.*, 13 Hun (N. Y.), 319; *Kansas City, etc., R. Co. v. Little*, 66 Kan. 378, 71 Pac. 820, 61 L. R. A. 122; *Oliver v. Columbia, etc., R. Co.*, 65 S. C. 1, 43 S. E. 307; *Griffin v. Southern Ry. Co.*, 65 S. C. 122, 43 S. E. 445; *Louisville, etc., R. Co. v. Wurl*, 62 Ill. App. 381; *Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 35 Am. St. Rep. 422; *Baltimore, etc., R. Co. v. Carr*, 71 Md. 135; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373, 6 Am. & Eng. R. Cas. 341; *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 690; *Knowles v. Norfolk South-*

Exemplary, punitive, or vindictive damages, each meaning the same thing, is something beyond actual compensation, something not given as due the injured person, but is awarded, regardless of the amount of damages actually sustained, upon public considerations, as a punishment of the defendant for the wrong inflicted, and for the protection of the public against the repetition of similar acts. In such cases the law uses the suit of a private party as an instrument of public protection, not for the sake of the suitor, but for that of the public. It is not the form of the action, but the moral culpability of the defendant, that confers the right to give punitive damages, and they are given in actions *ex delicto*, as a punishment of the defendant and admonition to others, for the prevention of fraud, malice, and oppression. They are not allowed where there has been no intentional offense, and defendant has done what he honestly believed to be his duty, but only where the wrong is done with evil intent, malice, willfulness, or in wanton indifference to the rights of others.<sup>87</sup> It is not necessary that

ern R. Co., 102 N. C. 59; *Rose v. Wilmington, etc., R. Co.*, 106 N. C. 168; *Holmes v. Carolina Cent. R. Co.*, 94 N. C. 318; *Pittsburgh, etc., R. Co. v. Lyon*, 123 Pa. St. 140, 10 Am. St. Rep. 517; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.), 123; *Appleby v. South Carolina, etc., R. Co.*, 60 S. C. 48, 38 S. E. 237.

The right to give exemplary damages in any case has been questioned. —*Wardrobe v. California Stage Co.*, 7 Cal. 119, 68 Am. Dec. 231; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *McKeon v. Citizens R. Co.*, 42 Mo. 79; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Rep. 757.

87. *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25. See also, *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17; *Denver Tramway Co. v. Cloud*, 6 Colo. App. 445; *Georgia,*

*etc., R. Co. v. Eskew*, 86 Ga. 641, 22 Am. St. Rep. 490, 47 Am. & Eng. R. Cas. 635; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Philadelphia, etc., R. Co. v. Hoefflich*, 62 Md. 300, 50 Am. Rep. 223; *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53; *Vicksburg, etc., R. Co. v. Scanlan*, 63 Miss. 413; and cases cited in note 86, *ante*.

Wanton and wilful expulsion of a passenger entitles him to recover punitive damages; *Dagnall v. Southern Ry. Co.*, 69 S. C. 110, 48 S. E. 97; *Story v. Norfolk, etc., R. Co.*, 133 N. C. 59, 45 S. E. 349; *Lake Erie, etc., R. Co. v. Christison*, 39 Ill. App. 495; *Louisville, etc., R. Co. v. Wolfe*, 128 Ind. 347, 25 Am. St. Rep. 436; *Gorman v. Southern Pac. R. Co.*, 97 Cal. 1, 33 Am. St. Rep. 157.

A brusque or dictatorial manner



harsh and unnecessary means be used in doing an act to show

is not an insult which justifies punitive damages; Northern Cent. R. Co. v. Newman (Md.), 56 Atl. 973; Louisville, etc., R. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600, 28 Am. & Eng. R. Cas. 135.

In action for ejection the passenger is not entitled to exemplary damages where he limits his claim for recovery to breach of contract. Moon v. Interurban St. Ry. Co., 85 N. Y. Supp. 363; Eddy v. Syracuse, etc., R. Co., 50 App. Div. (N. Y.) 109, 63 N. Y. Supp. 645; Monnier v. New York, etc., R. Co., 175 N. Y. 281, 67 N. E. 569; Carleton v. Lombard, Ayres & Co., 19 App. Div. (N. Y.) 297, 46 N. Y. Supp. 120; Fink v. Albany, etc., R. Co., 4 Lans. (N. Y.) 147; Brown v. Rapid Ry. Co. (Mich.), 90 N. W. 290, 9 Det. L. N. 127.

Insult and villification accompanying ejection entitles to exemplary damages. Georgia R. Co. v. Olds, 77 Ga. 673; Louisville, etc., R. Co. v. Ballard, 88 Ky. 159.

Intent to injure, degrade, or oppress passenger by wrongfully expelling him held to justify exemplary damages. Palmer v. Charlotte, etc., R. Co., 3 S. C. 580.

Willful refusal to carry entitles to exemplary damages. Memphis, etc., R. Co. v. Green, 52 Miss. 779; Heirn v. McCaughan, 32 Miss. 17, 56 Am. Dec. 588.

Ejection of passenger from moving train a cause for exemplary damages. Galena v. Hot Springs R. Co., 4 McCrary (U. S.), 371.

Lawful ejection but in wanton manner and with unnecessary force

will entitle a passenger to punitive damages. Philadelphia, etc., R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442; Tomlinson v. Wilmington, etc., R. Co., 107 N. C. 327, 47 Am. & Eng. R. Cas. 620.

A malicious assault by a conductor on a passenger entitles a recovery for punitive damages. Lexington Ry. Co. v. Cozine, 23 Ky. L. Rep. 1137, 64 S. W. 848; Atlantic, etc., R. Co. v. Condor, 75 Ga. 51.

Gross neglect causing a collision entitles to award of punitive damages. Louisville, etc., R. Co. v. McClain, 23 Ky. L. Rep. 1878, 66 S. W. 391.

Delay in transportation due to carrier's negligence entitles only to actual and not to exemplary damages. Illinois Cent. R. Co. v. Pearson (Miss.), 31 So. 435.

Ejection of a passenger elsewhere than at station does not justify exemplary damage, in the absence of improper conduct. Chicago, etc., R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562; Chicago, etc., R. Co. v. Wilson, 23 Ill. App. 63.

Failure to protect passengers from assault or insult does not entitle to punitive damages, unless there has been a willful refusal or failure to do so when called upon, or the injury occurs in the employee's presence. New Orleans, etc., R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689, 9 Am. Ry. Rep. 303.

Wantonly carrying passenger beyond destination entitles to punitive damages. Birmingham Ry., etc., Co. v. Nolan (Ala.), 32 So. 715;

malice. It may be inferred from circumstances of time and place and the existing conditions that the act was done in a spirit of malice or wantonness.<sup>88</sup>

### § 10. Exemplary damages.—Gross negligence.

In some of the authorities it is held that negligence of a carrier which is gross and wanton, or gross neglect of the carrier's employes, is sufficient to entitle the injured person to punitive or exemplary damages.<sup>89</sup> But more generally the rule held seems to be that exemplary damages may be awarded for negligence which is so gross as to evince an entire want of care and is sufficient to

Samuels v. Richmond, etc., R. Co., 35 S. C. 493, 28 Am. St. Rep. 883, 52 Am. & Eng. R. Cas. 315; Packet Co. v. Nagle, 97 Ky. 9, 29 S. W. 743; Higgins v. Louisville, etc., R. Co., 64 Miss. 80; Vicksburg, etc., R. Co. v. Scanlan, 63 Miss. 413; Dawson v. Louisville, etc., R. Co. (Ky.), 11 Am. & Eng. R. Cas. 134; Hall v. South Carolina R. Co., 28 S. C. 261.

**But failure to carry to destination**, there being no proof of willfulness, wantonness, or rudeness, does not entitle to exemplary damages. Fort v. Southern Ry. Co. (S. Co.), 42 S. E. 196; Alabama, etc., R. Co. v. Purnell, 69 Miss. 652; Louisville, etc., R. Co. v. Champion, 24 Ky. L. Rep. 87, 63 S. W. 143.

**And carrying beyond station**, in the absence of malice, insult or willful wrong, does not entitle to exemplary damages. Kansas City, etc., R. Co. v. Fite, 67 Miss. 373.

**Evidence of conductor as to his intent and honest belief in ejecting a passenger** is proper upon the question of exemplary damages, though not material as to compensatory

damages. Yates v. New York Cent., R. Co., 67 N. Y. 100; Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Georgia R. Co. v. Homer, 73 Ga. 251. See Hendricks v. Sixth Ave. R. Co., 44 N. Y. Super. Ct. 11.

**88. Alabama G. S. R. Co. v. Sellers**, 93 Ala. 9, 30 Am. St. Rep. 17; City, etc., R. Co. v. Brauss, 70 Ga. 368; Jeffersonville R. Co. v. Rogers, 93 Ind. 1106, 10 Am. Rep. 103; New Orleans, etc., R. Co. v. Hurst, 36 Miss. 661, 74 Am. Dec. 85; Evans v. St. Louis, etc., R. Co., 11 Mo. App. 463.

**89. Kansas Pacific R. Co. v. Kessler**, 18 Kan. 523; Frink v. Coe, 4 Green (Iowa), 555, 61 Am. Dec. 141; Louisville Southern R. Co. v. Minogue, 90 Ky. 369, 29 Am. St. Rep. 378; Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; Hopkins v. Atlantic, etc., R. Co., 35 N. H. 9, 72 Am. Dec. 287; Maysville, etc., R. Co. v. Herrick, 13 Bush (Ky.), 122; Louisville, etc., R. Co. v. McCoy, 81 Ky. 403, absence of slight care is gross negligence.

raise a presumption of conscious indifference to consequences, or so gross as to be equivalent to positive misconduct.<sup>90</sup> A neglect of duty not attended with any circumstances of insult, aggravation of feelings, of injury to the person or his property, or of bodily or mental suffering, would not amount to gross negligence and justify the imposition of exemplary damages.<sup>91</sup>

### § 11. Exemplary damages for carrier's acts.

The carrier, whether a corporation or a private person, is liable in exemplary damages for acts of a reckless and criminal nature, or so gross and culpable as to evince utter recklessness; for instance, knowingly and wantonly employing an incompetent servant, or retaining him in its employ after knowledge of his incompetency or unfitness,<sup>92</sup> or willfully, maliciously, or so negligently

**90.** *Fisher v. Metropolitan Elev. R. Co.*, 34 Hun (N. Y.), 433; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489, 6 Am. Ry. Rep. 512; *Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65; *Richmond, etc., R. Co. v. Vance*, 93 Ala. 144, 30 Am. St. Rep. 41; *Alabama G. S. R. Co. v. Arnold*, 80 Ala. 600; *Chattanooga, etc., R. Co. v. Liddle*, 85 Ga. 482, 21 Am. St. Rep. 169; *Augusta, etc., R. Co. v. Randall*, 79 Ga. 304, 34 Am. & Eng. R. Cas. 439, the facts need not show criminal liability; *Rutherford v. Shreveport, etc., R. Co.*, 41 La. Ann. 793; *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *Missouri Pac. R. Co. v. Mitchell*, 72 Tex. 171; *Missouri Pac. R. Co. v. Shepherd*, 72 Tex. 165, 37 Am. & Eng. R. Cas. 194; *Union Pac. R. Co. v. Hause*, 1 Wyoming, 27.

**91.** *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Chi-*

*cago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373, holding that the dicta, in *New Orleans, etc., R. Co. v. Bailey*, 40 Miss. 395, that any negligence of a railroad company operated by steam is gross, and, in *Memphis, etc., R. Co. v. Green*, 52 Miss. 779, that punitive damages may be inflicted on a carrier for mere omission of duty, are incorrect. See also, *Spicer v. Chicago, etc., R. Co.*, 29 Wis. 580; *Seymour v. Chicago, etc., R. Co.*, 3 Biss. (U. S.) 43; *Kentucky Cent. R. Co. v. Dills*, 4 Bush (Ky.), 593.

**92.** *Cleghorn v. New York Cent., etc., R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375; *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101; *Porter v. Erie R. Co.*, 32 N. J. L. 261; *Ackerson v. Erie R. Co.*, 32 N. J. L. 254; *Sullivan v. Oregon R., etc., Co.*, 12 Or. 392, 53 Am. Rep. 364; *Hagan v. Providence, etc., R. Co.*, 3 R. I. 88, 62 Am. Dec. 377; *Texas Trunk R. Co. v. Johnson*, 75 Tex. 158; *Dillingham v. Russell*,

as to indicate a wanton disregard of the rights of others, enforcing arbitrary, unreasonable and illegal regulations,<sup>93</sup> or willfully and knowingly failing to provide safe appliances or to construct and keep its road and machinery in proper and safe condition.<sup>94</sup> For the purpose of fixing such liability on the corporation a superintending agent with power to employ and discharge men may be deemed the corporation itself,<sup>95</sup> or, as to passengers on the train, the conductors in charge,<sup>96</sup> although it has been held that only the president and general manager, or in his absence the vice-president, actually wielding the executive power, may be treated as the corporation, but not the conductor or other subordinate or servant.<sup>97</sup>

## § 12. Exemplary damages for acts of servants.

For injuries by the negligence of a servant while engaged in the business of the carrier, within the scope of his employment, the latter is liable for compensatory damages; but it is not liable in punitive damages for such negligence, however wilful or ma-

73 Tex. 47, 15 Am. Rep. 753; Galveston, etc., R. Co. v. Donahoe, 56 Tex. 162; Hays v. Houston, etc., R. Co., 46 Tex. 272; Frink v. Coe, 4 Green (Iowa), 555, 61 Am. Dec. 141.

93. Illinois Cent. R. Co. v. Johnson, 67 Ill. 312; Illinois Cent. R. Co. v. Cunningham, 67 Ill. 316; Pittsburgh, etc., R. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517, 37 Am. & Eng. R. Cas. 231.

94. Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 30 Am. St. Rep. 65, 90 Ala. 71, 24 Am. St. Rep. 764; Missouri Pac. R. Co. v. Shuford, 72 Tex. 165, 37 Am. & Eng. R. Cas. 194; Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; Missouri Pac. R. Co. v. Mitchell, 72 Tex. 171. But for cases

where the facts were held not to justify exemplary damages, see Chattanooga, etc., R. Co. v. Liddell, 88 Ga. 482, 21 Am. St. Rep. 169; Rutherford v. Shreveport, etc., R. Co., 41 La. Ann. 793; International, etc., R. Co. v. Brazzil, 78 Tex. 314; Union Pac. R. Co. v. Hause, 1 Wyoming, 27; Richmond, etc., R. Co. v. Vance, 93 Ala. 144, 30 Am. St. Rep. 41, knowledge of defect held essential to recovery.

95. Cleghorn v. New York Cent., etc., R. Co., 56 N. Y. 44, 15 Am. Rep. 375.

96. Bass v. Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437, 15 Am. Ry. Rep. 45.

97. Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 101.

licious, gross or culpable, unless it is also chargeable with gross misconduct. Such misconduct on the part of the carrier may be established by showing that the act of the servant was authorized or ratified, or that the carrier employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied.<sup>98</sup> This rule has been maintained in many cases and applied to cases of gross negligence of servants in the running of trains,<sup>99</sup> unlawful ejection,<sup>1</sup> assaults by employes,<sup>2</sup> and wrongfully procuring the arrest of a passenger.<sup>3</sup> The rule more generally followed, however, both in cases where any distinction between the acts of the carrier and those of its servants is rejected as unjust, and those which do not refer to such a distinction, is that exemplary damages should be awarded against the carrier for the malicious act or gross negligence of its servants, or where the injury complained of was accompanied by unnecessary force and was influenced by a servant of the carrier in the line of his duty, without reference to any express or implied participation in the tort by the carrier, by authorizing it before or approving it after its commission.<sup>4</sup> And it has been held that

98. *Cleghorn v. New York Cent., etc., R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375.

99. *Ackerson v. Erie R. Co.*, 32 N. J. L. 254; *Porter v. Erie R. Co.*, 32 N. J. L. 261; *Wardrobe v. California Stage Co.*, 7 Cal. 118, 68 Am. Dec. 231; *Texas Trunk R. Co. v. Johnson*, 75 Tex. 158.

1. *Pittsburgh, etc., R. Co. v. Russ*, 57 Fed. 822; *Sullivan v. Oregon R., etc., Co.*, 12 Or. 392, 53 Am. Rep. 364, 21 Am. & Eng. R. Cas. 391; *Hagan v. Providence, etc., R. Co.*, 3 R. I. 88, 62 Am. Dec. 377; *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162; *Hays v. Houston, etc., R. Co.*, 46 Tex. 272; *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep.

437; *Milwaukee, etc., R. Co. v. Finney*, 10 Wis. 388.

2. *Randolph v. Hannibal, etc., R. Co.*, 18 Mo. App. 609; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753; *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 25 Am. St. Rep. 901; *Craker v. Chicago, etc., R. Co.*, 36 Wis. 659.

3. *Fisher v. Metropolitan El. R. Co.*, 34 Hun (N. Y.), 433; *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101.

4. Cases holding the rule of the text and rejecting the distinction between the act of the carrier and that of its servants.—*Fell v. Northern Pac. R. Co.*, 44 Fed. 249; *Baltimore, etc., R. Co. v. Blocher*, 27 Md. 277;

there is no class of cases where the rule can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers, and that it might as well not be applied to them at all as to limit its application to cases where the servant is directed or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for such cases will never occur.<sup>5</sup>

### § 13. Elements affecting the amount of damages.

The rule by which damages are to be estimated, where they are such as are not capable of direct proof and assessment, and what elements are to be considered and within what limits the damages may be estimated, are as a general principle, matters of law for the court to determine and instruct the jury for their guidance. The amount of compensation to be awarded for physical disability and physical and mental pain and suffering, and the future consequences reasonably certain to result from a personal injury, are not capable of exact proofs, or accurate measurement, and no precise rule exists or is capable of being applied by which the extent of the recovery can be prescribed. Accordingly, in this class of cases, the law commits to the determination of the jury, under

Quigley v. Central Pac. R. Co., 11 Nev. 250, 21 Am. Rep. 757; Spellman v. Richmond, etc., R. Co., 35 S. C. 475, 28 Am. St. Rep. 858; Samuels v. Richmond, etc., R. Co., 35 S. C. 495, 28 Am. St. Rep. 883; Quinn v. South Carolina R. Co., 29 S. C. 381, 37 Am. & Eng. R. Cas. 166; Springer Transp. Co. v. Smith, 16 Lea (Tenn.), 498.

Cases maintaining the rule of the text without reference to the distinction.—See cases cited generally in notes to § 9, *ante*, from the following States: Alabama, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri and Tennessee.

5. Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39. See also, Kansas City, etc., R. Co. v. Sanders, 98 Ala. 293; Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; Louisville, etc., R. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600, 28 Am. & Eng. R. Cas. 135; Hanson v. European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404; Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; Hopkins v. Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287; Atlantic, etc., R. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Palmer v. Charlotte, etc., R. Co., 3 S. C. 580.

proper instructions from the court as to the elements to be considered, the amount of damages to be awarded, and the jury, in estimating them, may consider the facts and circumstances, in connection with their knowledge, observation and experience in the affairs of life, and award such an amount as will reasonably compensate for the injuries received according to the evidence in the case.<sup>6</sup> The elements proper to be taken into consideration by the jury to enable it to ascertain and fix the amount of damages have been held by the courts to be a consideration of the injured person's position, condition, and circumstances in life,<sup>7</sup> the business or profession in which he is engaged and the extent and amount of his ordinary business,<sup>8</sup> the means at his disposal and ability

6. *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 360; *Hill v. Union Ry. Co.*, 25 R. I. 565, 57 Atl. 374; *North Chicago St. R. Co. v. Fitzgibbons*, 180 Ill. 466, 54 N. E. 483, 79 Ill. App. 632; *Washington & G. R. Co. v. Patterson*, 9 App. D. C. 423, 25 Wash. L. Rep. 36; *Morgan v. Southern Pac. R. Co.*, 95 Cal. 501, 29 Am. St. Rep. 143; *Chicago, etc., R. Co. v. Holdridge*, 118 Ind. 231; *Hill v. New Orleans, etc., R. Co.*, 11 La. Ann. 292; *Baltimore, etc., R. Co. v. Carr*, 71 Md. 135; *Winkler v. Missouri, etc., R. Co.*, 21 Mo. App. 99; *Pennsylvania R. Co. v. Allen*, 53 Pa. St. 276; *Gulf, etc., R. Co. v. Head* (Tex. App.), 15 S. W. 504; *Abbot v. Tolliver*, 71 Wis. 64; *Blanchard v. Windsor, etc., R. Co.*, 10 Nova Scotia. 8; *Phillips v. London, etc., R. Co.*, 5 Q. B. Div. 78.

7. *Mackoy v. Missouri Pac. R. Co.*, 5 McCrary (U. S.), 538; *The Oriflamme*, 3 Sawy. (U. S.) 397; *Brignoli v. Chicago, etc., R. Co.*, 4 Daly (N. Y.), 182; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409; *Louisville, etc.,*

*R. Co. v. Miller*, 141 Ind. 533; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Whalen v. St. Louis, etc., R. Co.*, 60 Mo. 323.

**Evidence of character.**—Compensatory damages for physical pain and suffering cannot be diminished by showing that plaintiff is an obscure man, a bartender, a professional gambler, or even a vagrant. *Hardy v. Minneapolis, etc., R. Co.*, 56 Fed. 657; *Brown v. Memphis, etc., R. Co.*, 4 Fed. 51, 5 Fed. 499; *Boyle v. Case*, 18 Fed. 880.

But evidence that a man was an habitual drunkard is competent on the question of his ability to earn full wages. *Cleveland, etc., R. Co. v. Sutherland*, 19 Ohio St. 151.

And evidence that a female is of unchaste character is competent upon the question of her ability to earn money or take care of a family. *Abbot v. Tolliver*, 71 Wis. 64.

8. *Wade v. Leroy*, 20 How. (U. S.) 34; *Rio Grande Western R. Co. v. Rubenstein*, 5 Colo. App. 121; *Ohio, etc., R. Co. v. Hecht*, 115 Ind. 443;

and capacity to earn money,<sup>9</sup> and the extent to which they are injured or impaired by reason of the injuries sustained.<sup>10</sup> The injured passenger cannot show the number of his family and their dependence on him for support for the purpose of increasing the damages.<sup>11</sup> Nor can the carrier show a life or accident policy or the payment and receipt of moneys thereon in mitigation of damages.<sup>12</sup>

#### § 14. Excessive or inadequate damages.

Where the damages awarded by the jury are either so large or so small as to be so obviously disproportionate to the injury proved

*Wallace v. Western North Carolina R. Co.*, 104 N. C. 442, 41 Am. & Eng. R. Cas. 212.

9. *San Antonio, etc., R. Co. v. Turney* (Tex. Civ. App.), 78 S. W. 256.

Decrease in earning capacity may be shown by proving what the business was worth for the year preceding the accident and after the accident. *Chicago, etc., R. Co. v. Meech*, 59 Ill. App. 69; *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42.

Amount of earnings at his trade, immediately before the accident, is admissible on the question of damages. *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9.

Past earnings of a professional man are competent on the question of damages. *Simonin v. New York, etc., R. Co.*, 36 Hun (N. Y.), 214; *Nash v. Sharpe*, 19 Hun (N. Y.), 365; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Phillips v. London, etc., R. Co.*, 5 Q. B. Div. 78.

10. Expectation of life may be shown, where the injury is perma-

nent, and standard life tables may be introduced for this purpose, so as to estimate the damage or loss sustained as nearly as possible. *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409; *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533; *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42.

But such evidence is not essential. —*Houston, etc., R. Co. v. Boehm*, 57 Tex. 152, 9 Am. & Eng. R. Cas. 366.

11. *Southern Pac. R. Co. v. Rauh*, 49 Fed. 696; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533; *Kreuziger v. Chicago, etc., R. Co.*, 73 Wis. 158.

12. *Kellogg v. New York Cent., etc., R. Co.*, 79 N. Y. 72; *Althorf v. Wolfe*, 22 N. Y. 355; *Missouri, etc., R. Co. v. Flood* (Tex. Civ. App.), 79 S. W. 1106; *Pittsburg, etc., R. Co. v. Thompson*, 56 Ill. 138, 3 Am. Ry. Rep. 454; *North Pennsylvania R. Co. v. Kirk*, 90 Pa. St. 15; *Harding v. Townsend*, 43 Vt. 536, 5 Am. Rep. 304; *Bradburn v. Great Western R. Co.*, L. R. 10 Exch. 1.



as to force upon the mind the conviction that the jury have acted under the influence of a perverted judgment, or have been influenced by partiality or prejudice, or misled by a mistaken view of the merits of the case, it is the duty of the court to set aside the verdict as excessive or inadequate and grant a new trial; but when it is not thus obviously excessive or inadequate the verdict of the jury should be sustained. This rule is generally observed both as to compensatory and exemplary damages.<sup>13</sup>

**13.** *Clapp v. Hudson River R. Co.*, 19 Barb. (N. Y.) 461; *Tinney v. New Jersey Steamboat Co.*, 5 Lans. (N. Y.) 507, 12 Abb. Pr. N. S. (N. Y.) 1; *Mullady v. Brooklyn H. R. Co.*, 65 App. Div. (N. Y.) 549, 72 N. Y. Supp. 911; *Sullivan v. Metropolitan St. Ry. Co.*, 54 App. Div. (N. Y.) 632, 66 N. Y. Supp. 609.

*U. S.*—*Fell v. Northern Pac. R. Co.*, 44 Fed. 248.

*Cal.*—*Morgan v. Southern Pac. R. Co.*, 95 Cal. 501, 29 Am. St. Rep. 143.

*Ga.*—*Atlantic, etc., R. Co. v. Con-  
dor*, 75 Ga. 51.

*Ill.*—*Chicago, etc., R. Co. v. Chis-  
holm*, 79 Ill. 584.

*Kan.*—*Union Pac. R. Co. v. Hand*, 7 Kan. 380.

*Ky.*—*Louisville Southern R. Co. v. Minogue*, 90 Ky. 369, 29 Am. St. Rep. 378.

*N. J.*—*Hanley v. North Jersey St. R. Co.* (N. J. Sup.), 47 Atl. 45.

*Tex.*—*International, etc., R. Co. v. Brazzil*, 78 Tex. 314.

*Va.*—*Farish v. Reigle*, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

*Wis.*—*Stutz v. Chicago, etc., R. Co.*, 73 Wis. 147, 9 Am. St. Rep. 769. See also *Nellis' Street Railroad Accident Law*, 609-630, and cases there cited.

## CHAPTER XXXI.

### INTERSTATE AND INTERNATIONAL TRANSPORTATION—WHAT CONSTITUTES COMMERCE—FEDERAL REGULATION.

#### SECTION 1. Commerce defined.

2. The commerce clause in the Constitution.—What is interstate commerce.
3. Commerce as including intercourse.
4. Commerce with foreign nations.
5. Commerce among the several States.
6. Historical comment.
7. Commencement of Federal regulation.
8. The Railroad Act of 1866.
9. The Granger Cases.
10. The Interstate Commerce Act.

#### § 1. Commerce defined.

The precise scope of the term "Commerce" has not yet been clearly and accurately defined. According to the derivation, history and use of the word, it is the exchange of property,<sup>1</sup> or the buying and selling of commodities; the latter as generally understood.<sup>1a</sup> Commerce is defined generally as "the interchange or mutual change of goods, wares, productions or property of any kind, between nations or individuals,<sup>2</sup> either by barter or by purchase and sale; trade; traffic;"<sup>3</sup> "the exchange of goods, productions or property of any kind;"<sup>4</sup> "interchange of goods, merchandise, or property of any kind; trade; traffic."<sup>5</sup> Other defi-

1. People ex rel. Hatch v. Reardon, 184 N. Y. 431, 452, 77 N. E. 970, 112 Am. St. Rep. 628.

1a. Metropolitan Bank v. Van Dyck, 27 N. Y. 400, 510.

2. Council Bluffs v. Kansas City, etc., R. Co., 45 Iowa, 338, 349, 24 Am. Rep. 773.

3. Webster Dict., *quoted* in Fuller v. Chicago, etc., R. Co., 31 Iowa, 187, 207.

4. Standard Dict.

5. Century Dict., *quoted* in State v. Indiana, etc., R. Co., 133 Ind. 69, 83, 32 N. E. 817, 18 L. R. A. 502, "used more especially of trade on a large scale, carried on by transportation of merchandise between different countries, or between different parts of the same country, distinguished as foreign commerce and internal commerce."

nitions are: "The exchange or buying and selling of commodities; especially the exchange of merchandise on a large scale between different places or communities; extended trade or traffic;"<sup>6</sup> "traffic, trade or merchandise in buying and selling of goods."<sup>7</sup> In a strict sense commerce is traffic in merchandise.<sup>8</sup> As early as 1824 Mr. Justice Johnson in his concurring opinion in the leading case of *Gibbons v. Ogden*, said: "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation."<sup>8a</sup> It "includes the usual agencies of communication and transportation employed to effect the exchange. Thus it extends to whatever is used to move the property involved and the persons engaged in making the contract."<sup>9</sup> "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."<sup>10</sup> The sense in which the word com-

6. Webster Dict., *quoted* in *State v. Indiana*, etc., R. Co., *supra*; *McGuire v. State*, 42 Ohio St. 530, 534.

7. Jacob L. Dict.

8. Burrill L. Dict.

8a. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1,229, 6 L. Ed. 23, *quoted* in *Mitchell v. Steelman*, 8 Cal. 363, 372; *Delaware, etc., Canal Co. v. Lawrence*, 2 Hun (N. Y.), 163, 179.

9. *People ex rel. Hatch v. Reardon*, *supra*.

10. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1,139, 6 L. Ed. 23, *quoted* in *Wilkerson v. Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572; *United States v. Holliday*, 3 Wall. (U. S.) 407, 18 L. Ed. 182; *United*

*States v. Burlington, etc., Ferry Co.*, 21 Fed. 331; *Williams v. Fears*, 110 Ga. 584, 589, 35 S. E. 699, 50 L. R. A. 685; *Pollock v. Cleveland Ship Bldg. Co.*, 56 Ohio St. 655, 668, 47 N. E. 582; *Western Union Tel. Co. v. Atlanta, etc., States Tel. Co.*, 5 Nev. 102.

In the *Passenger Cases*, 7 How. (U. S.) 283, 12 L. Ed. 702, the rule declared in *Gibbons v. Ogden* was applied in holding invalid certain State statutes imposing taxes upon alien passengers. It was said that commerce included navigation and intercourse and the transportation of passengers. See also, *State v. Foreman*, 8 Yerg. (Tenn.) 256.

merce is used in the Constitution seems not only to include traffic, but intercourse and navigation.<sup>11</sup> It has been defined as that intercourse and traffic which has to do with the exchange of commodities.<sup>12</sup> It is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between citizens of one country and the citizens or subjects of other countries, and between the citizens of different States.<sup>13</sup> The common idea of commerce is reciprocal agreements by which one person delivers to another a material thing for money, which is a sale, or for another thing, which is an exchange.<sup>14</sup>

## § 2. The commerce clause in the Constitution.—What is Interstate Commerce.

The commerce clause in the Federal Constitution is as follows: "The Congress shall have power . . . to regulate commerce with foreign nations, among the several States, and with the Indian tribes."<sup>15</sup> The term commerce is not defined in the Constitution itself, but the Supreme Court of the United States has given it a broad and comprehensive meaning and has held that it embraces not alone traffic in commodities, but also all commercial intercourse, including the transportation of passengers, the transmission of intelligence by the telegraph and the telephone and, according to a recent decision, the transmission of knowl-

11. Bouvier L. Dict.; Story, Const., § 1057.

12. 7 Cyc. 412.

13. *In re Charge to Grand Jury*, 151 Fed. 834; *United States v. Swift*, 122 Fed. 529, *affd.* *Swift v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347 (*quoted in* *Preston v. Finley*, 72 Fed.

850); *Campbell v. Chicago, etc., R. Co.*, 86 Iowa, 587, 53 N. W. 351, 17 L. R. A. 443; *McNaughton v. McGirl*, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367); *Passenger Cas.*, 7 How. (U. S.) 283, 12 L. Ed. 702; 7 Cyc. 412.

14. *International Text-Book Co. v. Lynch*, 81 Vt. 101, 69 Atl. 541.

15. Const. U. S., art. 1, § 8, par. 3.

edge or instruction by mail.<sup>15a</sup> An approved definition of the courts is the following: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."<sup>16</sup> It has also been said: "Commerce includes the fact of intercourse and of traffic and the subject-matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons."<sup>17</sup> In the sense used in the Constitution commerce is the transportation and exchange of traffic in articles or commodities between different States, or between the United States and foreign countries or with the Indian tribes.<sup>18</sup> It has also been said: "Commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph."<sup>19</sup> Commerce includes "trade,

15a. *International Text-Book Co. v. Pigg*, 217 U. S. 91, 52 L. Ed.—, 30 Sup. Ct. 481. See next section.

16. *County of Mobile v. Kimball*, 102 U. S. 691, 702, 26 L. Ed. 238, approvingly quoted in *Lottery Case* (*Champion v. Ames*), 188 U. S. 321, 351; 23 Sup. Ct. 321, 325, 47 L. Ed. 492; *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391. To the same effect, *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 241, 20 Sup. Ct. 96, 107, 44 L. Ed. 136; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158 (quoted in

*Williams v. Fears*, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 635); In re Grand Jury, 62 Fed. 840, 841; *Groves v. Slaughter*, 15 Pet. (U. S.) 449, 10 L. Ed. 800.

17. *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 392; *Sweatt v. Boston, etc., R. Co.*, 3 Cliff. (U. S.) 339, 23 Fed. Cas. No. 13,684, quoted in *Pollock v. Cleveland Ship Bldg. Co.*, 56 Ohio St. 655, 47 N. E. 582.

18. *McGuire v. State*, 42 Ohio St. 530.

19. *Lottery Case* (*Champion v. Ames*), 188 U. S. 352, 23 Sup. Ct. 321, 325, 47 L. Ed. 492.

traffic, intercourse.”<sup>20</sup> The fact of intercourse and traffic includes the negotiation of the sale of goods, wares and merchandise, which are in other States, whether by solicitor or sample;<sup>21</sup> the purchase of goods between citizens of different States, made in either State;<sup>22</sup> communication by telegraph or telephones;<sup>23</sup> the transit of persons;<sup>24</sup> the transportation of persons or property by boat, rail, or express;<sup>25</sup> the piping of oil or gas;<sup>26</sup> driving of cattle,<sup>27</sup> in completion of a commercial transaction across State lines, and the written documents whereby such transactions are effected.<sup>28</sup> As to the means and instrumentalities by which intercourse and traffic are carried on, the commerce powers of the Constitution extend “from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies come into use. They were intended for all times and all circumstances;”<sup>29</sup> and they also extend to the interstate bridges.<sup>30</sup> Eventually the airship or flying machine must be included.<sup>31</sup> Insurance;<sup>32</sup> loaning money;<sup>33</sup> dealing in lands in

20. *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. Ed. 678.

21. *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 289; *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. 576.

22. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349; *McNaughton v. McGirl*, 20 Mont. 124, 63 Am. St. Rep. 610.

23. *Muskogee Tel. Co. v. Hall*, 118 Fed. 382 and cases cited in section 3, *infra*.

24. *Covington Bridge Co. v. Kentucky*, 154 U. S. 204, 218, 14 Sup. Ct. 1087; *Crandall v. Nevada*, 6 Wall. (U. S.) 35.

25. *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851; *The Daniel*

*Ball*, 10 Wall. (U. S.) 557; *The Passenger Cases*, 7 How. (U. S.) 283.

26. *State v. Indiana, etc., Co.*, 120 Ind. 575.

27. *Kelly v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259.

28. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563.

29. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

30. *Luxton v. North River Bridge*, 153 U. S. 525, 14 Sup. Ct. 891.

31. *The Hamburg-American Steamship Company and the German Airship Stock Company*, who are joint owners of the monster Zeppelin airship “Deutschland,” have already established a regular airship service of

other States;<sup>34</sup> or in foreign bills of exchange;<sup>35</sup> or in futures;<sup>36</sup> or carrying on a building and loan association business;<sup>37</sup> or a brokerage or commission business;<sup>38</sup> or the transfers of corporate shares;<sup>39</sup> or the sale or transportation of the waters of one State into another State,<sup>40</sup> is not interstate commerce, in such a sense as to prevent State regulation. Neither is mining;<sup>41</sup> nor the production or manufacture of things intended for interstate commerce;<sup>42</sup> nor gathering them together for the purpose of sending them to other States;<sup>43</sup> or, after sending them there, keeping them there for the purpose of use or sale,<sup>44</sup> if not in the original package.<sup>45</sup>

### § 3. Commerce as including intercourse.

It has been held that commerce is intercourse or consists of or includes intercourse.<sup>46</sup> This statement is perhaps too broad, unless

300 miles, carrying twenty passengers, and on schedule time have beaten the regular express train service between two important cities of the empire.

32. *New York Life Insurance Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207.

33. *Nelms v. Mortgage Co.*, 92 Ala. 157.

34. *Honduras, etc., Co. v. State Board*, 54 N. J. L. 278.

35. *Bamberger v. Schoolfield*, 100 U. S. 149.

36. *Ware & Leland v. Mobile County*, 209 U. S. 405, 28 Sup. Ct. 526, 121 Am. St. Rep. 21.

37. *Southern Building & L. Assoc. v. Norman*, 98 Ky. 294.

38. *United States v. Hopkins*, 171 U. S. 578.

39. *New York v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188.

40. *Hudson County Water Co. v.*

*McCarter*, 209 U. S. 349, 28 Sup. Ct. 529.

41. *Utley v. Mining Co.*, 4 Colo. 369.

42. *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6.

43. *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. 266.

44. *Pittsburg Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091.

45. *May v. New Orleans*, 178 U. S. 496, 20 Sup. Ct. 976.

46. *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 189, 6 L. Ed. 23. See *Lottery Case* (*Champion v. Ames*), 186 U. S. 321, 346, 23 Sup. Ct. 321, 323, 47 L. Ed. 492; *Hickory Marble & Granite Co. v. Southern Ry. Co.*, 147 N. C. 53, 60 S. E. 719.

the term intercourse be considered in the restricted sense of "an interchange of commodities, by purchase and sale, contracts, etc.,"<sup>47</sup> rather than in the broad sense of "communication,"<sup>48</sup> or "communication between persons and places,"<sup>49</sup> which would include correspondence by letters and conversation. Commerce comprehends or includes only partially what is embraced within the meaning of the term intercourse. Having this in view, perhaps, commerce has in some instances been defined as commercial intercourse.<sup>50</sup> Commerce, it has also been said, "comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities."<sup>51</sup> Commerce "means commercial intercourse in all its branches."<sup>52</sup> "Commerce" within the Federal Constitution comprehends all the intercourse between the parties necessarily or ordinarily involved in a commercial transaction with reference to merchantable commodities.<sup>53</sup> In a very recent case the Supreme Court of the United States held that commerce is conducted among the States, within the meaning of the Federal Constitution, by a corporation conducting a correspondence school engaged in imparting instruction by correspondence, whose business involves the solicitation of students in other States by local agents, who are also to collect and forward to the home office the tuition fees, and the systematic intercourse between the corporation and its scholars and agents, wherever situated, and the transportation of the needful books, apparatus, and papers.<sup>54</sup> The

47. Webster Dict.

48. Webster Dict.

49. Century Dict.

50. *United States v. E. C. Knight Co.*, *supra*; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 470, 14 Sup. Ct. 1125, 1130, 38 L. Ed. 1047; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9, 24 L. Ed. 708; *Gibbons v. Ogden*, *supra*. See *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347.

51. *State v. Peet*, 80 Vt. 449, 68 Atl. 661.

52. *Snead v. Central of Georgia Ry. Co.*, 151 Fed. 608.

53. *Loverin & Browne Co. v. Travis*, 115 N. W. 829, 135 Wis. 322.

54. *International Text-Book Co. v. Pigg*, 217 U. S. 91, 52 L. Ed. —, 30 Sup. Ct. 481.

In a recent case the Kentucky Court of Appeals held that the business of reporting credits through se-



court in the case last cited based its decision largely on the telegraph cases,<sup>55</sup> holding that "the transmission of intelligence," carrying "only ideas, wishes, orders, and intelligence" across State lines is interstate commerce, and said: "If intercourse between persons in different States by means of telegraph messages conveying intelligence or information is commerce among the States, which no State may unnecessarily burden or encumber, we cannot doubt that intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States, . . . especially where such intercourse and communication really relate to matters of regular, continuous business, and to the making of contracts and the transportation of books, papers, etc., appertaining to such business."

#### § 4. Commerce "with foreign nations."

The phrase "commerce with foreign nations" has been said to mean "commerce between citizens of the United States and citizens or subjects of foreign governments."<sup>56</sup> "Every species of commercial intercourse between the United States and foreign nations" is included within the term "commerce."<sup>57</sup> A sale of goods by a citizen of a foreign nation to a citizen of the United States, accompanied by a transportation of the goods from one country to the other, or the solicitation of such business, is commerce with foreign nations.<sup>58</sup>

#### § 5. Commerce "among the several States."

"Definitions as to what constitutes interstate commerce are not

lected attorneys was not interstate commerce. *United States Fidelity & Guaranty Co. v. Commonwealth*, 139 Ky. 27, 129 S. W. 314.

55. *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

56. *United States v. Holliday*, 3

Wall. (U. S.) 407, 417, 18 L. Ed. 182, approved in *Henderson v. Mayor of New York*, 92 U. S. 259, 23 L. Ed. 543.

57. *Gibbons v. Ogden*, 9 Wheat. (U. S.)

58. *Wagner v. Meakin*, 92 Fed. 76, 63 U. S. App. 477, 33 C. C. A. 577.

easily given. . . . It comprehends, as it is said, intercourse for the purpose of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different States.”<sup>59</sup> “Commerce among the States . . . means commerce which concerns more States than one—not mere internal regulation and traffic.”<sup>60</sup> “Interstate commerce, or commerce among the States, means the exchange of property in one State for property in another State. Its essential characteristic is that the property affected must be transported to some point without the State. There must be interstate movement of property. . . . There can be no interstate commerce without interstate transportation of property.”<sup>61</sup> “All commerce is either under the control of the State or nation, and when merchandise is carried from one State into another, no system can be devised to make it intrastate traffic.”<sup>62</sup> “If any commercial transaction reaches an entirety in two or more States, and if the parties dealing with reference to that transaction deal from different States, then the whole transaction is a part of the interstate commerce of the United States, and subject to regulation by Congress under the Constitution.”<sup>63</sup> Commerce between States consists of intercourse between their citizens and includes the transportation of persons and property and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities, and the power to regulate that commerce involves the right to prescribe rules by which it shall be governed.<sup>64</sup> Commerce among the States comprehends intercourse for the purpose of trade in any and all its forms, including the transportation,

59. *Hopkins v. United States*, 171 U. S. 578, 597, 19 Sup. Ct. 40, 43 L. Ed. 290.

60. *State v. Foreman*, 8 Yerg. (Tenn.) 256, 316. See *Belle City Mfg. Co. v. Frizzell*, 149 Fed. 486, 11 Ida. 1, 81 Pac. 58.

61. *People ex rel. Hatch v. Rear-*

*don*, 184 N. Y. 431, 452, 77 N. E. 970, 112 A. S. R. 628.

62. *United States v. Chicago, etc., R. Co.*, 149 Fed. 486.

63. *In re Charge to Grand Jury*, 151 Fed. 834.

64. *Hickory Marble & Granite Co. v. Southern R. Co.*, 147 N. C. 53, 60 S. E. 719.

purchase, sale, and exchange of commodities between the citizens of different States.<sup>65</sup>

## § 6. Historical comment.

Commerce was encouraged and protected by the ancients in those early times when transportation, both by land and water, was insecure and attended with great risks, and as commerce increased it occupied an important place in the polity of ancient civilization. The Mediterranean Sea was once the home of the commerce of what was then the civilized world. In the States bordering upon it a body of customs and sea-laws, which had their origin in the necessities of commerce, sprung up. They differed in many respects from the civil law, which was, in effect, the common law of those States. When the Hanse towns along the Baltic became prosperous and when France began to send ships from her Atlantic ports, most of these usages and customs were transported to the North. They were codified and promulgated at different times and by different governments, which thus gave form and expression to the previously known and recognized usages and customs which had been for centuries in force among the principal maritime nations of Europe. Of these Codes, the celebrated *Ordonnance de la Marine* is the most complete.<sup>66</sup> Of this it has been said by Chancellor Kent: "Every commercial nation has rendered homage to the wisdom and integrity of the French Ordinance of the Marine, and they have regarded it as a digest of the Maritime laws of civilized Europe."<sup>67</sup> But commerce was ignored by the rude early English common law and disdained by feudalism. The decisions of the courts of England before the time of Lord Mansfield, toward the close of the eighteenth century, had little or no reference to the commercial law of Europe. The

65. *State v. Peet*, 80 Vt. 449, 68 Atl. 661.

66. Wheeler, *Modern Law of Carriers*, pp. 3, 4.

67. Kent, *Comm.*, Vol. 3, pp. 16, 17.

English, before the discovery of the mariner's compass in the twelfth century, were not and could not be a commercial people. But as England became more civilized, commerce grew in legal importance until, through the decisions of Lord Mansfield, the law merchant became clearly recognized and defined as a part of the common law.<sup>68</sup> The colonists of that part of America which now constitutes the United States, who were English, came to America when the commercial spirit was acquiring that strength which has made of England a great maritime country. The altered circumstances of the new country to which they came, the fact that their very existence depended on commerce, and the power and manifest future of the new commercial movement, led the far-seeing men who framed our Constitution to give a stable government, with powers adequate in all its branches, executive, legislative and judicial, to insert provisions in that instrument intended to unshackle commerce from petty State interference. The condition of things co-existing with the making of the Constitution, and which might be reasonably anticipated to exist in the future, furnished ample reasons for giving to Congress power over interstate and foreign commerce. There existed at the time thirteen States, and it was understood that this number would be increased. Each of these States possessed powers common to all independent nations of regulating their own commerce and the law of contracts; they could discriminate in regulating commerce in favor of their own citizens and against the citizens of other States or nations. Most of the then States possessed harbors upon the ocean, and were engaged in foreign commerce, and commerce among themselves. Under such circumstances it was obvious, indeed it was already found, that there could be no such thing as harmony, no uniformity of regulations touching such commerce. Some of the States tried to agree upon a system for themselves, and failed. The system of one State would nullify the system of another or other States. Free importations by one

68. 7 Cyc. 413.

State would render impracticable the system of other States, imposing duties for revenue or for the protection of home industry. Embarrassing and unreasonable regulations, touching commerce between the citizens of one State and other States, would be made. Commerce between the citizens of one State and other States might be prohibited and destroyed. The Confederacy had no power to derive a revenue from importations, nor had the States practically this power, as they never would be able to agree upon a common system, and owing to their geographical positions, any system other than for trade would be practically nullified by the action of the other States. This state of things could not last. The people were powerless to protect their interests. A change was necessary, if they were to indulge hopes of future prosperity. This practically powerless condition of the people was an important, if not the most important, reason for making an effort to devise a remedy, and the remedy devised was the Constitution. A leading object of the Constitution was to get rid of all conflicting commercial interests and, as to commerce, to effect a union of all the people of all the States, great and small, and make them one people, one nation, without divided interests, and without power, as States, to produce divided interests or conflicts. This was a leading idea in favor of the Constitution and perhaps the most valuable one.<sup>69</sup> The conditions which led to the introduction of the commerce clause into the Federal Constitution have been described by an interested contemporary observer in the following language: "The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal government to enforce

69. Metropolitan Bank v. Van Dyck, 27 N. Y. 400, 508, 510.

them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress.<sup>70</sup> It has been said in a recent case: "The power of Congress to regulate commerce among the States is, perhaps, the most benign gift of the Constitution. Indeed it may be said that without it the Constitution would not have been adopted. One of the chief evils of the confederation was the power exercised by the commercial States of exacting duties upon the importation of goods destined for the interior of the country or for other States. The vast territory to the west of the Alleghenies had not yet been developed or subdivided into States, but the evil had already become so flagrant that it threatened an utter dissolution of the Confederacy. The article was adopted that all of the States of the Union might have the benefit of the duties collected at the maritime ports, and to relieve them from the embarrassing restrictions imposed upon the internal com-

70. *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 445, 446, 6 L. Ed. 678, per Marshall, C. J. See also, *Northern Securities Co. v. United States*, 193 U. S. 197, 353, 24 Sup. Ct. 436, 463, 48 L. Ed. 679; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 470, 14 Sup. Ct. 1125, 1130, 38 L. Ed. 1047; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 498, 7 Sup. Ct. 592, 597, 30 L. Ed. 694; *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557, 573, 7 Sup. Ct.

4, 11, 30 L. Ed. 244; *County of Mobile v. Kimball*, 102 U. S. 691, 697, 26 L. Ed. 238; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015; *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 12, 224, 6 L. Ed. 23; *United States v. The William*, 28 Fed. Cas. No. 16,700; *Story Const. §§ 259 et seq.* 1057; *Pomeroy Const. L. § 327*; *Tucker Const. §§ 250, 252*; 5 *Elliott's Debates*, 109-122; 24 *Am. L. Rev.* 25.

merce of the country.”<sup>71</sup> Under the articles of confederation adopted during the Revolutionary War Congress had power to regulate trade with the Indians, but the control of foreign and interstate commerce remained with the States. The defect of the articles of confederation in failing to provide for the control of this commerce and the universally recognized necessity for national control over foreign commerce especially led to the calling of the Philadelphia convention of 1787, which framed the Constitution. Immediately prior to this the Annapolis Commercial convention of 1786 had been held at the instance of the Virginia Legislature to consider the “trade of the United States, to examine the relative situation in the trade of the States, to consider how far a uniform system in their commercial relations may be necessary to the common interests and their permanent harmony.” This had been brought about by the report of the Commissioners on the compact between Virginia and Maryland relative to the navigation of the Potomac river and the Chesapeake Bay. The report of the proceedings in the convention of 1787 furnishes but little light for the interpretation of the commerce clause. It has been said that there does not appear to have been therein “any considerable (if, indeed, there was any) opposition to the grant of the power. It was reported in the first draft of the Constitution exactly as it now stands, except that the words ‘and with the Indian tribes,’ were afterwards added; and it passed without a division.”<sup>72</sup> There was comparatively little discussion in the debates of the convention or in the Federalist concerning the Federal control over interstate commerce, and no consideration seems to have been given to the question of the effect of this grant of the Federal power upon the police or taxing power of the States. It was regarded as essentially supplemental to the control over foreign commerce, and was granted so as to make

71. *Cook v. Marshall County*, 196 U. S. 261, 272, 25 Sup. Ct. 233, 236, 49 L. Ed. 471.

72. Story Const., § 1059.

the control over foreign commerce effective.<sup>73</sup> It has been said that "without this supplemental provision the great and essential power of regulating foreign commerce would have been incomplete and ineffectual, and that with State control of interstate commerce, ways would be found to load the articles of import and export during the passage through their jurisdiction with duties, which would fall on the makers of the latter and the consumers of the former."<sup>74</sup> Commerce among the States at the time of the adoption of the Constitution in 1787 was very simple, and other than that carried on in teams and wagons was carried on by navigation. The far-reaching importance of this Federal control over commerce among the States apparently was not and could not be foreseen. It only came to be fully realized in the course of years, as the commercial development of the country demanded a judicial construction of the Federal power in harmony with the requirements of such commerce.<sup>75</sup> The basis of this construction for all time was made by the far-sighted and masterful reasoning in the broad and comprehensive opinions of Chief Justice Marshall.<sup>76</sup> The judicial history of the commerce clause of the Constitution is the clearest example of the adapta-

73. See Elliott's Debates; Prentice & Egan's Commerce Clause, chap. 2; 24 Am. Law Rev. 25; Judson, Interstate Commerce, p. 3.

74. Federalist No. 42.

75. Prior to 1840 only 5 cases involving the construction of the clause had been decided by the Supreme Court.

76. Judson, Interstate Commerce, p. 4; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311, wherein Justice Bradley said: "A great number and variety of cases involving the commercial power of congress have been brought to the attention of this court during the

past fifteen years, which have frequently made it necessary to re-examine the whole subject with care and the result has sometimes been that in order to give full and fair effect to the different clauses of the constitution, the court has been constrained to refer to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify to some degree certain dicta and decisions which occasionally have been made in the intervening period."



tion of a written constitution by construction to conditions and emergencies never contemplated by its framers.<sup>77</sup> In affirming the supremacy of the Federal power in interstate commerce, the Supreme Court, in 1895, said:

“Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad trains and steamships. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce, unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.”<sup>78</sup> In a recent message to Congress the President of the United States says: “I believe that under the interstate clause of the Constitution the United States has complete and paramount right to control all agencies of interstate commerce, and I believe that the national government alone can exercise this right with wisdom and effectiveness so as both to secure from, and to do justice to, the great corporations which are the most important factors in modern business.”<sup>79</sup>

## § 7. Commencement of Federal regulation.

As we have already shown, among the most important of the subjects which prompted the formation of the Constitution was the necessity, created by the then existing conditions, of giving to Congress the power to regulate commerce among the States, as well as

77. Judson, *Interstate Commerce*, p. 4.

78. *In re Debs*, 158 U. S. 564, 591, 15 Sup. Ct. 900, 39 L. Ed. 1092.

79. Message of President Roosevelt to 60th Congress (Dec. 1908).

with foreign nations. The clause conferring this power early received a broad and comprehensive construction by the Supreme Court under Chief Justice Marshall, which has constituted the basis of all subsequent decisions. It is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation.<sup>89</sup> But the magnitude of the power delegated to the Federal government by that clause was not foreseen at the time of the adoption of the Constitution as the development of an immense interstate commerce, with its incidental multitude of phases and ramifications, has disclosed it to later generations. The recognition of its extent and importance has been of gradual growth in the court called upon to construe the provision. Nearly a century elapsed after the commercial clause in the Constitution was adopted before State legislation, which sought to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, was held to be an encroachment upon the exclusive power of Congress, and the embarrassments upon interstate transportation, as an element of interstate commerce, by reason of the discriminating legislation of the States, became too oppressive to be submitted to and led to the judicial determination that "this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations; but, if it be a regulation of commerce, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."<sup>81</sup> In 1887 it was also declared by our highest court that "in the matter of interstate commerce the United States are but

80. *County of Mobile v. Kimball*,  
102 U. S. 691, 697, 26 L. Ed. 238,  
239.

81. *Wabash, etc., R. Co. v. People  
of Illinois*, 118 U. S. 557, 7 Sup. Ct.  
4, 30 L. Ed. 244, 1 Int. Com. Rep. 31.

one country, and are and must be subject to one system of regulations, and not to a multitude of systems," and that the doctrine of the freedom of that commerce, except as regulated by Congress, was firmly established.<sup>82</sup> By that decision certain principles were declared to have been already established by the decisions of this court, among which are the following:

1. That the Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation.<sup>83</sup>

2. That where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereinafter mentioned, is repugnant to such freedom.<sup>84</sup>

82. *Robbins v. Taxing District of Shelby County*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, 1 Int. Com. Rep. 45.

83. This was decided in the case of *Cooley v. Board of Wardens of Phila.*, 53 U. S. (12 How.) 299, 319, 13 L. Ed. 996, 1004, and was virtually involved in the case of *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23, and has been confirmed in many subsequent cases, amongst others, in *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, *supra*; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 5 Sup. Ct. 826, 29 L. Ed. 158, 161; *County of Mobile v. Kimball*, 102 U. S. 691, 697, 26 L. Ed. 238, 239; *Railroad Co. v. Husen*, 95 U. S. 465, 469, 24 L. Ed. 527, 529; *Henderson v. Mayor of New York*, 92 U. S. 259, 272, 23 L. Ed. 543, 549;

*State Freight Tax Cases*, 82 U. S. (15 Wall.) 232, 279, 21 L. Ed. 146, 162; *Ward v. Maryland*, 79 U. S. (12 Wall.) 418, 430, 20 L. Ed. 449, 452; *Crandall v. Nevada*, 73 U. S. (6 Wall.) 35, 42, 18 L. Ed. 745, 746; *Passenger Cases*, 48 U. S. (7 How.) 283, 12 L. Ed. 702; *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, 6 L. Ed. 678.

84. This was held by Mr. Justice Johnson in *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 222, 6 L. Ed. 23, 76; by Mr. Justice Johnson in the *Passenger Cases*, 48 U. S. (7 How.) 283, 462, 12 L. Ed. 702, 777; and has been affirmed in subsequent cases. *Wabash, etc., R. Co. v. Illinois*, *supra*; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635, 29 L. Ed. 785; *Walling v. Michigan*, 116 U. S. 446, 455, 29 L. Ed. 691, 694;

3. That the only way in which commerce between the States can be legitimately affected by State laws is when, by virtue of its police power, and its jurisdiction of persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making such internal regulations a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject.<sup>85</sup> In 1888 and

*Brown v. Houston*, 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. Ed. 257, 260; *County of Mobile v. Kimball*, *supra*; *Welton v. Missouri*, 91 U. S. 275, 282. 23 L. Ed. 347, 350; *Railroad*

*Co. v. Husen*, *supra*; *State Freight Tax Cases*, *supra*.

85. See cases cited in last two preceding notes.

1890 the Supreme Court extended the same principle of the freedom of interstate commerce to the police power of the States in the liquor traffic decisions, holding that the section of the Statute of Iowa, the validity of which was questioned, did not fall within the foregoing enumeration of legitimate exertions of the police power, and was, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject. "If not in contravention of any positive legislation by Congress, it is nevertheless a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations."<sup>86</sup> Whenever the law of a State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void.<sup>87</sup>

### § 8. The railroad act of 1866.

The first legislation by Congress on the general subject of interstate commerce by means of railroads, other than the incorporation of the land grant and government aided Pacific railroads in 1862, was the Act of Congress of June 15, 1866, since incorporated in the Revised Statutes as section 5258, which provides that "Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight, and property

86. *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, 1 Int. Com. Rep. 823, 834. 87. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 123, 3 Int. Com. Rep. 37, 46.

on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination. But this section shall not affect any stipulation between the Government of the United States and railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which such railroad or connection may be proposed. And Congress may at any time alter, amend, or repeal this section." Referring to this Act and the Act of July 25, 1866, authorizing the construction of bridges over the Mississippi River, the Supreme Court said: "These Acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi; and they were intended to reach trammels interposed by State enactments or by existing laws of Congress. . . . The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation."<sup>88</sup> The first mentioned Act was also declared by the Supreme Court to be a declaration by Congress in favor of the great policy of continuous lines, and, therefore, as favoring such business arrangements between companies as would make such connections effective.<sup>89</sup> Congress also legislated on the subject of the transportation of passengers and

88. *Railroad Co. v. Richmond*, 19 Wall. (U. S.) 584, 22 L. Ed. 173.

*cago, etc., R. Co.*, 163 U. S. 589, 16 Sup. Ct. 1173, 41 L. Ed. 268, 274.

89. *Union Pacific R. Co. v. Chi-*

merchandise in chapter 6, title 48, of the Revised Statutes, sections 4252 to 4289, inclusive, having reference, however, mainly to transportation in vessels by water. But sections 4278 and 4279 relate also to the transportation of nitro-glycerine and other similar explosive substances by land or water, and either as a matter of commerce with foreign countries or among the several States. Section 4280 provides that "The two preceding sections shall not be so construed as to prevent any State, Territory, district, city or town within the United States from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use or consumption therein."<sup>90</sup> And the Supreme Court has said that "So far as these regulations made by Congress extend they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by the States in particular cases by the express permission of Congress."<sup>91</sup> The effect of the Act of June 15, 1866, was to enable the business connections between railroads of different States, for interstate transportation, to be lawfully made, subject to the condition, however, that such connections should be formed by authority from the State in which they might be proposed to be made. The statute authorized railroads on one State "to connect with roads of other States so as to form continuous lines for transportation" purposes. It, however, imposed no duties upon carriers so as to compel through routing of interstate traffic. It merely permits or authorizes the carriage of traffic from one State to another, and to that end, the formation of continuous lines, evidently by mutual agreement.<sup>92</sup> It did not prevent the operation of police laws of the

90. Act of July 3, 1866.

91. *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, 1 Int. Com. Rep. 823, 830.

92. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. 567, 633, 2 Int. Com. Rep. 102, 119, 351, 388.

States affecting interstate railways.<sup>93</sup> It did not interfere with the laws of the States having for their object the personal security of passengers, nor with such State enactments as a statute making it unlawful to run any freight trains on Sunday,<sup>94</sup> or to bring into the State cattle liable to communicate disease to other cattle,<sup>95</sup> and render them void as unconstitutional regulations of interstate commerce. But, because of the commerce clause of the Constitution and this statute, authorizing interstate connections for the transaction of interstate commerce, it has been held that railroad cars belonging to a railroad company of another State and sent from that State loaded with freight, to be returned loaded with freight to the former State in the transaction of interstate commerce, could not be levied upon under a State attachment, nor would another railroad company having in its possession such cars in the process of carrying on such commerce be liable to garnishment by reason of its possession of such cars.<sup>96</sup>

### § 9. The Granger cases.

During the decade from 1870 to 1880 certain of the Western States passed stringent statutes for the regulation of railway charges. In some instances the statute itself provided maximum rates for the carriage of freight. The Illinois legislature, in the Constitution of 1870,<sup>97</sup> was given express power to establish reasonable maximum rates by railroad for the transportation of passengers and freight on the different railroads of that State. In litigation arising under these statutes, which are commonly re-

93. *Railroad Co. v. Fuller*, 17 Wall. (U. S.) 560, 21 L. Ed. 710, a State law requiring railroad companies to post up their rates of fare and freight, and imposing penalties for non-observance, is not a regulation of commerce and void for infringing the exclusive power of Congress, but is valid as a police regulation.

94. *Hennington v. Georgia*, 163 U.

S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166. 16 Sup. Ct. 1086.

95. *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878, 18 Sup. Ct. 488.

96. *Davis v. Cleveland, etc., R. Co.*, 146 Fed. 403; *Wall v. Norfolk, etc., R. Co.*, 52 W. Va. 485, 64 L. R. A. 501, 44 S. E. 294.

97. Art. XI, § 12.



ferred to as Granger legislation, it was claimed that the statutes were void because they amounted to a regulation of commerce among the States, and the courts held that the regulation attempted was a thing of domestic concern confined to State commerce, or such interstate commerce as directly affected the people of the States, and that until Congress acted in reference to their interstate relations and undertook to legislate for those who are without the State, the State might exercise all the powers of government necessary for the promotion of the general welfare of those within its jurisdiction, even though in so doing it might indirectly affect those without and indirectly operate upon commerce outside its immediate jurisdiction, and, therefore, the acts were valid in the absence of regulation by Congress.<sup>98</sup> The Supreme Court of Illinois cited the cases above referred to in support of its view of the subject in sustaining a State statute as to so much of interstate transportation as was within the limits of the State of Illinois.<sup>99</sup> But the Supreme Court of the United States in a decision reversing the Supreme Court of Illinois, said that in the Granger cases the two questions of primary importance that were presented and decided were the general right of the State, within which a railroad company did business, to regulate transportation charges and the companies' contract rights under their charters to regulate and establish their own fares and rates of transportation; that the importance of these questions overshadowed all others, and though it was true that, as incidental or auxiliary to these, the question of the exclusive right of Congress to make such regulations of charges as any legislative power had the right to make, to the exclusion of the States, was presented, it received but little attention at the hands of the court; and that in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable

98. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 164, 24 L. Ed. 97;

*Peik v. Chicago, etc., R. Co.*, 94 U. S. 155, 24 L. Ed. 94.

99. *Wabash, etc., R. Co. v. Illinois*, 104 Ill. 476.

rivers, and many others, could be acted upon by the State, in the absence of any legislation by Congress on the same subject. The Court, therefore, notwithstanding what had been said in the opinions of the court in those cases, in view of other cases decided near the same time, held, and asserted that it had never consciously held otherwise, that a statute of a State, intended to regulate or to tax, or to impose any other restriction upon the transportation of persons or property or the transmission of telegraphic messages from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress, and that such a statute is void even as to that part of such transportation or transmission which may be within the State.<sup>1</sup>

### § 10. The Interstate Commerce Act.

The power over commerce between the States given to Congress by the Constitution was not taken advantage of until the year 1887, when the Interstate Commerce Act was passed.<sup>2</sup> It was said by the Supreme Court in the *Import Rate Case*<sup>3</sup> that the causes which induced its enactment "grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, practically they are. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of carriage. From the very nature of the case, therefore, railroads are monopolies, and the evils

1. *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, 1 Int. Com. Rep. 31, 35.

2. Act of Feb. 4, 1887; 24 Stat. 379; 3 Comp. St., p. 809.

3. *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 222, 16 Sup. Ct. 666, 40 L. Ed. 940, 5 Int. Com. Rep. 405, 416.

that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroad were charged, and sometimes truthfully, with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities. Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies, and by general enactments by the several States, such as clauses restricting the rates of toll, and forbidding railroads from becoming concerned in the sale or production of articles carried, and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers—particularly that one which requires uniformity of treatment in like conditions of service. As, however, the powers of the States were restricted to their own territories, and did not enable them to efficiently control the management of great corporations whose roads extend throughout the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result.” The Interstate Commerce Act was modeled to a considerable extent on the English Acts,<sup>4</sup> although many of its provisions were influenced by prior State legislation. The Tennessee drummer case,<sup>5</sup> in which the freedom

4. “In fact, the 2d section of our Act was modeled upon section 90 of the English “Railway Clauses Consolidation Act” of 1845, known as the “Equality Clause,” and the 3d section of our Act was modeled upon the 2d section of the English “Act for the Better Regulation of the Traffic on Railways and Canals” of July 10, 1854, and the 11th section of the Act

of July 21, 1873, entitled “An Act to Make Better Provision for the Carrying into Effect the Railway and Canal Traffic Act of 1854, and for Other Purposes Connected Therewith.” Shiras, J., in *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 222, 16 Sup. Ct. 666, 40 L. Ed. 940, 5 Int. Com. Rep. 405, 427.

of interstate commerce from State taxation was declared, had been argued and was pending in the Supreme Court, and the decision of the same court in the Wabash case,<sup>6</sup> denying to the States any power for the regulation of interstate traffic, had been rendered, during the previous year while the interstate commerce bill was pending in Congress, and were the subject of frequent references in the discussions of the provisions of the proposed Act.

5. This case was argued November 5, 1886, and decided March 7, 1887.

6. Decided October 25, 1886.

## CHAPTER XXXII.

### INTERSTATE AND INTERNATIONAL TRANSPORTATION.

- SECTION**
1. Regulation of interstate transportation.
  2. The Interstate Commerce Act of 1887.
  3. The Railroad Rate Act of 1906.
  4. The Mann-Elkins Act of 1910.
  5. The purpose, scope, and effect of the acts.
  6. Carriers subject to the acts.
  7. Charges must be reasonable and just.
  8. Unjust discrimination.
  9. Unjust discrimination in specific cases.
  10. Undue or unreasonable preference or advantage.
  11. Undue preference in particular cases.
  12. Preferences and discriminations.—In general.
  13. What constitutes preference or discrimination.
  14. Justification or defense.
  15. Preference or discrimination by giving rebates.
  16. Discrimination in car distribution.
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  18. Equal facilities for interchange of traffic.
  19. Charges for long and short hauls.
  20. Schedules of rates, fares, and charges.
  21. Change of rates.
  22. Charges in general.
  23. Special rates.
  24. Pooling of freights or dividing earnings.
  25. Interruption of continuous carriage.
  26. Mileage, excursion, or commutation tickets.
  27. Authority of Commission as to regulations or practices affecting rates.
  28. Transportation of passengers.
  29. The commodities clause.—Construction and constitutionality.
  30. Switching privileges.—Construction of the act.
  31. Discrimination as to switch connections.
  32. Power of the Commission to fix rates under amendments of 1906 and 1910.
  33. Carriage of particular articles.
  34. Enforcement of the act.—Judicial proceedings to enforce regulations.
  35. Contracts in violation of regulations.
  36. Damages for violation of regulations.

SECTION 37. The common law in interstate commerce.

38. Common law remedies of the State courts in interstate commerce.

39. Commerce Court created.—Jurisdiction and powers.

40. Commerce Court abolished.—Jurisdiction vested in it transferred to and vested in the District Courts.

## § 1. Regulation of interstate transportation.

The commerce clause of the Constitution provides that Congress shall have power “to regulate commerce with foreign nations and among the several States and with the Indian tribes.”<sup>1</sup> It is well settled that under this clause the power to regulate interstate commerce is vested exclusively in Congress.<sup>2</sup> Interstate commerce, or commerce among the several States of the union, consists in intercourse and traffic, including navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.<sup>3</sup> Transportation is the means by which commerce is carried on,<sup>4</sup> and is a constituent part of commerce itself.<sup>5</sup> The transportation of freight or passengers from one State to another, or through more than one State, either by land or water, constitutes interstate commerce, regardless of the distance from which it comes or to which it is bound before or after crossing a State line.<sup>6</sup> The means of trans-

1. Const. U. S., art. 1, § 8, cl. 3.

2. *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 469; *Brown v. Houston*, 114 U. S. 622; *Crutcher v. Kentucky*, 141 U. S. 57; *State Freight Tax Case*, 15 Wall. (U. S.) 232.

3. *Henderson v. New York*, 92 U. S. 259; *Addyston Pipe, etc., Co. v. United States*, 175 U. S. 211; *United States v. Joint Traffic Assoc.*, 171 U. S. 505; *Hooper v. California*, 155 U. S. 648; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Welton v. Missouri*, 91 U. S. 280; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 194.

4. *Council Bluffs v. Kansas City, etc., R. Co.*, 45 Iowa, 338, 24 Am. Rep. 773.

5. *Hopkins v. United States*, 171 U.

S. 578; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 479; *Kaeiser v. Illinois Cent. R. Co.*, 18 Fed. 151; *Chicago, etc., R. Co. v. Fuller*, 17 Wall. (U. S.) 560.

6. *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Rhodes v. Iowa*, 170 U. S. 412; *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 713; *People v. Raymond*, 34 Cal. 492; *Fry v. State*, 63 Ind. 562; *Bennett v. American Express Co.*, 83 Me. 236; *State v. Carrigan*, 39 N. J. L. 35; *Texas, etc., R. Co. v. Avery* (Tex. Civ. App.), 33 S. W. 704; *Fargo v. Michigan*, 121 U. S. 230; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204.

portation and the time of transit are immaterial. The business of receiving and landing passengers and freight is incident to their transportation and constitutes a part of interstate commerce.<sup>7</sup>

## § 2. The Interstate Commerce Act of 1887.

By the Interstate Commerce Act of 1887, Congress, in pursuance of its constitutional power to regulate commerce among the States, assumed control of the interstate railway traffic of the country. The principle objects of that act were "to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar conditions and circumstances; to prevent undue and unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights."<sup>8</sup> To secure these ends certain regulations applicable to railway carriers engaged in interstate transportation were established, and a commission created charged with the administration and enforcement of the act. The act has been held to be constitutional,<sup>9</sup> and to be liberally construed so as to promote and facilitate commerce, and not to hamper or destroy it, and not so as to abridge or take away the common law right of the carrier to make contracts, and adopt proper business methods, further than its terms and recognized purposes required. The act was intended primarily for the benefit of interstate traffic and not for the benefit of the carriers.<sup>10</sup> The interstate commerce

7. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

8. Interstate Commerce Com. v. Cincinnati, etc., R. Co., 167 U. S. 510; Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197; Interstate Commerce Com. v. Baltimore, etc., R. Co., 145 U. S. 263; United States v. Missouri Pac. R. Co., 65 Fed. 905.

9. Interstate Commerce Com. v. Brimson, 154 U. S. 448; Bullard v. Northern Pac. R. Co., 10 Mont. 168.

10. Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107; Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409; Little Rock, etc., R. Co. v. St. Louis, Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 63 Fed. 775; Chicago,

commission has no legislative powers. It is not a court, and has no judicial power, although it has and exercises a *quasi* judicial power. It is an administrative board exercising administrative powers.<sup>11</sup> The powers and duties of the commission are to some extent defined by the act. Generally, it is authorized to inquire into the management of the business of all common carriers subject to the provisions of the act, and to demand from such carriers full and complete information necessary to enable the commission to perform its duties, and it has power to execute and enforce the provisions of the act. The act provides for complaints, investigations, reports, and orders as to alleged violations.<sup>12</sup> It is not within the scope of this work to treat of these subjects in detail; it was held, under the original act, that the commission had no power to fix or establish rates for the future, either maximum or minimum,<sup>13</sup> or to require the adoption of

etc., *R. Co. v. Osborne*, 52 Fed. 914; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. 567. See also cases cited in preceding notes to this section.

11. See cases in preceding notes to this section. *Interstate Commerce Com. v. Cincinnati, etc., R. Co.*, 76 Fed. 183, 64 Fed. 981; *Cincinnati, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 184; *Maximum Rate Case*, 167 U. S. 479: "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and having respect to the large amount of property in-

vested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attached to such carriage, is a power of supreme delicacy and importance." *Maximum Rate Case*, 167 U. S. 479.

12. See cases cited in note 1 to this section.

13. *Southern Pac. R. Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 779, 42 C. C. A. 12; *Interstate Commerce Com. v. Chicago, etc., R. Co.*, 94 Fed. 272; *Interstate Commerce Com. v. Northeastern R. Co.*, 83 Fed. 611; *Farmers L. & T. Co. v. Northern Pac. R. Co.*, 83 Fed. 249; *Shinkle, etc., R. Co. v. Louisville, etc., R. Co.*, 76 Fed. 1007; *Interstate Commerce Com. v. Lehigh Valley R. Co.*, 74 Fed. 784; *Interstate Commerce Com. v. Alabama M. R. Co.*, 69 Fed. 227, 74 Fed. 715; *Interstate Commerce Com. v.*



rates on an equal and uniform mileage basis,<sup>14</sup> or to raise rates,<sup>15</sup> or to establish through rates between connecting lines.<sup>16</sup> Neither have the courts power to fix rates.<sup>17</sup> The authority of the commission and the courts is limited to determining whether the rates fixed by the carriers are for any reason in violation of the statute.<sup>18</sup> A common carrier is prohibited by the common law from making any unjust and unreasonable charges, and this common law prohibition has been reinforced by the interstate commerce act as to all interstate rates of railway companies.<sup>19</sup> The legislature of a State can regulate the charges of railway companies for the transportation of passengers and freight wholly within the State,<sup>20</sup> but a State cannot regulate the charges in respect to interstate commerce.<sup>21</sup> The power of a State to regulate the charges of railway companies in respect of transportation wholly within the State is subject to the Fourteenth Amendment of the Constitution of the United States and a State statute, or a regulation made under authority of a State statute, limiting or fixing the rates of a railway company within the State in such a manner as to deprive

Western, etc., R. Co., 93 Fed. 83; Thatcher v. Delaware, etc., Canal Co., 1 Int. Com. C. Rep. 152; Thatcher v. Fitchburg R. Co., 1 Int. Com. Rep. 356. See also cases cited in previous notes to this section.

See also Act to Regulate Commerce, approved February 4, 1887, as amended by act approved March 2, 1889, act approved February 10, 1891, act approved February 8, 1895, and act approved February 19, 1903.

14. LaCrosse Mfrs., etc., Union v. Chicago, etc., R. Co., 2 Int. Com. Rep. 9, 1 Int. Com. C. Rep. 629.

15. Poughkeepsie Iron Co. v. New York Cent., etc., R. Co., 3 Int. Com. Rep. 248, 4 Int. Com. C. Rep. 195; Matter of Chicago, etc., R. Co., 2 Int. Com. Rep. 137, 2 Int. Com. C. Rep.

231; Interstate Commerce Com. v. Cincinnati, etc., R. Co., 56 Fed. 925.

16. Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 567.

17. Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107.

18. Thatcher v. Delaware, etc., Canal Co., 1 Int. Com. C. Rep. 152; Cox v. Lehigh Valley R. Co., 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535.

19. Maximum Rate Case, 167 U. S. 479; Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184.

20. Munn v. Illinois, 94 U. S. 113; Chicago, etc., Ry. Co. v. Iowa, 94 U. S. 155.

21. Hanley v. Kansas City S. Ry. Co., 187 U. S. 617.

the company of reasonable compensation, would be in violation of the Constitution.<sup>22</sup> While Congress can prohibit railway companies from charging more than reasonable compensation for the services rendered by them in interstate transportation, it has not unlimited power to interfere with them in their interstate transportation, or to exercise unlimited control over interstate railway companies in the use of their property, or in the transaction of their business. It is well settled that the Fifth Amendment and the Fourteenth Amendment not only prevent Congress and the several States from actually confiscating their property or destroying its value, but also protect their liberty of contract and the liberty of the owner of property in its use and enjoyment.<sup>23</sup> Rates can be fixed by Congress, or a commission created by Congress, only on the basis of allowing the carrier to charge in each case reasonable compensation for the services rendered. Whether the rate charged by the carrier requires the payment of more than reasonable compensation for the services rendered is the question in each instance.<sup>24</sup> It has been held that "the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public."<sup>25</sup> But this may not necessarily confine such rates to a reasonable net return on the original cost, or the cost of reproduction, of the property. Other elements may be taken into consideration in determining whether rates will pay a railway company a reasonable compensation for its services.<sup>26</sup> The commission has no authority to establish through routes by requiring connecting carriers to make a joint tariff for through routing and billing.<sup>27</sup>

22. *Smyth v. Ames*, 169 U. S. 466.

23. *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684; *Allgeyer v. Louisiana*, 165 U. S. 578; *Lochner v. New York*, 25 S. Ct. 539, Adv. S. U. S. 539.

24. *Cotting v. Stock Yards Co.*, 183 U. S. 79; *Canada Southern Ry. Co.*

*v. International Bridge Co.*, 8 App. Cas. 723.

25. *Smyth v. Ames*, 169 U. S. 466.

26. *San Diego Land Co. v. National City*, 174 U. S. 754. See also cases cited last two preceding notes.

27. *New York, etc., R. Co. v. Platt*, 7 Int. Com. Rep. 323; *Gulf, etc., R.*

### § 3. The Railroad Rate Act of 1906.

The Act of Congress, approved June 29, 1906, popularly known as the Railroad Rate Act, and being an act amendatory of the Interstate Commerce Act of 1887 and all acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission, made many important and radical changes in the law, which may properly be briefly referred to here.<sup>28</sup> By this act it was attempted to vitalize the powers of the Interstate Commerce Commission and afford relief for every discrimination, injustice, and extortion, practiced by a common carrier engaged in interstate commerce in so far as it is possible to do so by law. This legislation was the outgrowth of demands upon the part of shippers of merchandise throughout the country for the enlargement of the powers of the Interstate Commerce Commission, so that certain abuses frequently perpetrated by common carriers by rail could be prevented. It had been believed by a large portion of the shippers that railway rates were in many instances too high, and that favoritism through rebates and other forms of discrimination were indulged in by various methods by the carriers. The ingenuity of some of the carriers and shippers was claimed to have resulted in their avoiding the provisions of the former act, and the more specific prohibitions relating to rebates, discriminations, and preferences contained in the Elkins Act of 1903. These results had been effected through the use of joint tariffs, involving, in some instances, a railroad and a mere switch owned by a shipper; through arrangements whereby excessive mileage was given to shippers of products who owned their own cars; through the use of refrigerator cars; through the permission given to independent corporations to render some service incident to the shipment, as the furnishing of ice in the bunkers of the car; by what is known as the "midnight tariff," a method involving an arrangement with

Co. v. Miami Steamship Co., 86 Fed. 28. Public No. 337. See Appendix 407. See also, cases cited note 34, A for text of the act.

§ 15, *post*.

a shipper to assemble his freights, have them ready for shipment at a particular date, whereupon the carrier would give the necessary three days' notice of a reduction in the rate; competing carriers and shippers knowing nothing about this arrangement, the freight of the favored shipper would be shipped at this new lower rate, and then there would be a restoration of the old rate; and by other means and devices. The act of 1906 sought to remedy these evils by amendments to existing law, preserving all of the former law that could be preserved, and amending it only by giving more power and making more plain some of its provisions.<sup>29</sup>

The first section of the act of 1906 contains many important amendments to section one of the act of 1887. It contains an enlargement of the definition of the word "railroad" so as to include "all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property herein designated, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and an enlargement of the definition of the word "transportation" so as to include "cars and other vehicles and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." These provisions are intended to obviate the devices resorted to by carriers through the use of switches and cars owned by shippers and through the use of refrigerator cars.

This section also defines as common carriers, within the meaning and purpose of the act, express companies and sleeping car companies, and any corporations or persons engaged in the transportation of oil or other commodity, except water and natural or artificial gas, by means of pipe lines. The issuance of passes or

29. See Report No. 591 of House Commerce, 59th Congress.  
Committee on Interstate and Foreign

free transportation in any form to all persons, except employes of carriers and their families and certain exempted classes, is forbidden, and a penalty of not less than \$100 nor more than \$2,000 is provided, not only for the person issuing such free transportation, but also for the person applying for and accepting it. Any railroad company is prohibited, on and after May 1, 1908, from transporting across any state or territorial line any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier. Common carriers subject to the provisions of the act are required to construct and operate upon reasonable terms sidetracks and switch lines and to provide cars for the movement of traffic without discrimination in favor of or against any shipper, and the Commission is given full power to enforce such requirements. These provisions have had a far-reaching effect and were the subject of much contention in both houses of Congress.

Section two contains certain amendments to section six of the Act of 1887, as amended by the Act of 1889, which are of great consequence to both carriers and shippers. Certain of these provisions are intended to secure more prompt obedience on the part of the carriers to the law relating to tariff schedules, and require storage, icing, and all other charges which the Commission may require to be stated in their schedules. Carriers must print and post in conspicuous places all tariffs and charges, and such tariffs and charges cannot be changed without thirty days' notice to the public and to the Interstate Commerce Commission, except where the Commission waives such notice. This requirement was inserted for the purpose of doing away with the discriminations heretofore made through the so-called "midnight tariffs." Carriers are required in time of war or threatened war, on demand of the President, to give preference and precedence

to the transportation of troops and munitions of war. Every person, company or corporation, whether carrier or shipper, is prohibited from offering, granting, giving, soliciting, accepting or receiving any rebate, preference, or discrimination. Heavy penalties, and in some instances imprisonment, are prescribed for violation of the provisions of the act, individuals and corporations alike to be guilty of misdemeanor for any violation willfully committed, and the corporations and individuals are held responsible for the acts of any agent. Failure to publish tariffs entails a fine of not less than \$1,000 and not more than \$20,000. Granting or accepting of rebates or kindred discriminations entails a fine of not less than \$1,000 and not more than \$20,000, and the individual guilty of such act is liable to imprisonment for not more than two years, in addition to the fine, in the discretion of the court. Any shipper who knowingly accepts a rebate or discrimination must, in addition to the above penalties, pay to the United States three times the value of such rebate or discrimination, and the attorney-general is required to bring civil suit to recover this penalty whenever he believes such violation of law to have occurred.

Section three of the act amends section 14 of the Act of 1887, as amended by the Act of 1889, which provided that the Commission's report of an investigation shall "include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found." The amendment now provides that the Commission's report shall "state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

The most important changes in the law are contained in section four, which contains marked modifications of section 15 of the Act of 1887. While not giving the Commission the power to initiate rates, it confers upon it the power to establish a rate or declare what will be a proper charge in certain cases. It provides that "the commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon complaint made as provided in section 13, or upon complaint of a common carrier, it shall be of the opinion that any of the rates or charges whatsoever demanded, charged or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair and reasonable thereafter to be followed; and to make an order that the carrier shall cease and desist from such violation to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed." Such order is to go into effect in thirty days after notice to the carrier, and to remain in force for a period of not exceeding two years, as shall be prescribed in the order, unless it be suspended, modified, or set aside by the Commission, or set aside or suspended by a court of competent jurisdiction. This section further provides that if the owner of property transported, directly or indirectly, renders any service in connection with or furnishes any instrumentality, the charges for these shall be no more than is just and reasonable, and

also gives to the Commission power upon complaint to determine what is a reasonable charge, as the maximum, to be paid by the carrier or carriers for the service or the use of the instrumentality. Under this provision those excessive charges, constituting rebates that are in some instances paid to shippers who own their own cars, may be controlled. The Commission may also establish through routes and fix maximum joint rates and determine upon the division of rates, when such division can not be agreed upon by the carriers, but this power is limited to cases when no reasonable or satisfactory through route exists. This provision applies where one of the parties to the joint rate is a water line.

Section five, which amends section 16 of the Act of 1887, as amended by the Act of 1889, makes radical changes in the methods of enforcing the provisions of the law through the Commission and the courts. Where the Interstate Commerce Commission orders a refund to a shipper or any award of damages to a complainant and the carrier fails so to refund or pay, the shipper or complainant may institute civil suit in the Circuit Court of the United States to recover; the findings and order of the Commission constitute *prima facie* evidence of the facts therein stated, and the petitioner is not liable for the costs in the Circuit Court or at any subsequent stage of the proceedings, unless they accrue upon his appeal, and if the petitioner finally prevails a reasonable attorney fee is allowed him as a part of the costs of the suit. For failure to obey an order of the Commission the carrier forfeits to the United States \$5,000 for each offense, and each day of a continuing violation is deemed a separate offense. The Interstate Commerce Commission or any person injured by failure of a carrier to comply with an order of the Commission, other than for the payment of money, may apply to the Circuit Court, and if the case is established the court shall issue a writ of injunction, mandatory or otherwise, to restrain such carrier from further disobedience, and from such action appeal by either party shall lie direct to the Supreme Court of the United States, where the case shall



have priority of hearing and determination over all other causes except criminal cases.

This section further provides that, in suits brought against the Interstate Commerce Commission, the venue to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the Circuit Court of the district where the carrier has its principal operating office, and jurisdiction is vested in such courts. The provisions of the Expediting Act of February 11, 1903, are made to apply to such suits, including hearings on application for preliminary injunctions, which may be granted only on hearing after five days' notice to the Commission. Appeals from any interlocutory order or decree are to be made only to the Supreme Court of the United States. These constitute the provisions of the so-called Allison amendment, which were inserted in the act as a compromise of the conflicting views entertained in Congress as to the proper scope of the courts' power to review the acts of the Commission.<sup>29a</sup>

**29a.** The power of Congress to regulate railway rates being generally assumed, the main difference of opinion in regard to the proposed legislation related to the question of the necessity of provisions for a review of the acts of the Commission by the courts and as to the scope of such review, whether it should be limited to exclude adjudications, *de novo*, of the rate fixed by the Commission, or should be a full review on all questions. Some of those who insisted on radical rate legislation would limit the scope of the judicial review by the courts of the rates fixed by the Commission, but would authorize a suspension of the rate pending the appeal. Others would give full court review but would not suspend the rate. It was sought by

some and was maintained to be competent to provide in the bill that a rate fixed by the Commission shall not be suspended by interlocutory decree pending an appeal to the court as to its reasonableness and constitutionality. Others contended that the powers of a court of equity cannot be abridged and that the act could not provide such a limitation of the court's inherent power. Another proposition was that a suspension of the rate be provided for, but that if the rate be suspended during appeal, there shall be deposited by the carrier with the court an amount sufficient to cover the difference between the rate complained of and the rate fixed by the Commission or that may be adjudged to be reasonable by the court.

By section six of the act a new section, 16a, is added, which provides the procedure for rehearings before the Commission in any proceeding.

Section seven of the act amends section 20 of the Act of 1887 so that the Commission is authorized to require the most comprehensive statistics from all common carriers regarding their business, under a penalty on the carriers of \$100 for every day in default. The Commission is also authorized to prescribe the form of all accounts kept by the carriers, and shall constantly have access to all records, accounts, and memoranda kept by them, refusal to grant such access entailing a penalty of \$500 for each offense or for each day such refusal is maintained. False entries made by any person keeping the books of a carrier are made punishable by a fine of from \$1,000 to \$5,000, or imprisonment from one to three years, or both. Carriers are required to issue bills of lading for all shipments accepted, and shall be liable in damages for the loss or injury of any property for which a bill of lading is given, and no contract, receipt, rule, or regulation shall exempt the carrier from liability.

Section eight of the act adds a new section, 24, by which the Interstate Commerce Commission is enlarged from five to seven members, whose salaries are increased from \$7,500 to \$10,000 annually and their term of office from six to seven years. The act provides that it shall take effect and be in force from and after its passage, but by concurrent resolution of Congress it is provided that the act shall not take effect until sixty days after its passage.

#### § 4. The Mann-Elkins Act of 1910.

Congress by the Act June 18, 1910, again made many important amendments to the Interstate Commerce Act, Feb. 4, 1887. In addition to creating the Commerce Court and defining its jurisdiction and powers and the practice in that court, it made the Interstate Commerce Act applicable to telegraph, telephone and cable companies, who shall be considered and held as common car-

riers within the meaning and purpose of the act, and provided for the classification of messages and the regulation of charges. Section 4 of the original act, known as the "long and short haul clause," was radically changed by striking out of the provision the words "under substantially similar circumstances and conditions," which have occasioned much contention in the courts, and by broadening the provision by adding the words "or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of the act." The text of this act, showing in detail, with appropriate annotations, the changes, modifications, and additions made by the act in and to the act as it stood prior to such amendment, is inserted in the Act in the appendix, to which reference should be made.<sup>30</sup> The text of the Interstate Commerce Act, as amended and revised to January 1, 1914, is printed in the appendix, as being the most convenient and useful for reference.<sup>31</sup>

### § 5. The purpose, scope, and effect of the acts.

The objects of the Interstate Commerce Act are to secure just rates, prohibit unjust discrimination, prevent undue preference, prohibit greater compensation for a shorter than for a longer distance, and abolish combinations.<sup>32</sup> It was not designed to prevent competition between different railroads.<sup>33</sup> The purpose of the Act is "equality of right to shippers;"<sup>34</sup> equality and uniformity of freight rates is the principal consideration in construing the In-

30. See Vol. 3, Appendix.

31. See Vol. 3, Appendix.

32. *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 141 Fed. 1003, *affd.* 209 U. S. 108, 28 Sup. Ct. 493, 52 L. Ed. —; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479, 510, 42 L. Ed. 243, 17 Sup. Ct. 896; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct.

844; *United States v. Missouri Pac. R. Co.*, 65 Fed. 903, 905, 5 Int. Com. Rep. 106; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. 37.

33. *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, *supra*; *East Tennessee, etc., R. Co. v. Interstate Commerce Commission*, 99 Fed. 52.

34. *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, *supra*,

terstate Commerce Act and regulations adopted thereunder.<sup>35</sup> The great purpose of the Act, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. The public purpose which the statute was intended to accomplish was to compel the carrier as a public agent to give equal treatment to all.<sup>36</sup> The object of Congress was to facilitate and promote commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences and discriminations.<sup>37</sup> The object of the statute relating to interstate commerce is to secure the transportation of persons and property by common carriers for reasonable compensation.<sup>38</sup> When the Act to Regulate Commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another.<sup>39</sup> That the Act to Regulate Commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed it is not open to controversy that to provide for these subjects was among the principal purposes of the Act.<sup>40</sup> And it is apparent that the means by which these

35. *St. Louis S. W. Ry. Co. of Texas v. Spring River Stone Co.*, 169 Mo. App. 109, 154 S. W. 465.

36. *New York, etc., R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515.

37. *Southern Pac. R. Co. v. Interstate Commerce Commission*, 200 U.

S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330.

38. *United States v. Chicago & A. R. Co.*, 148 Fed. 646 (C. C., Ill., 1906).

39. *Parsons v. Chicago & N. Ry. Co.*, 167 U. S. 447; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 45 U. S. 263.

40. *Texas & Pac. R. Co. v. Abilene*

great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law.<sup>41</sup> To secure these ends certain regulations applicable to railway carriers engaged in interstate transportation were established, and a Commission created charged with the administration and enforcement of the Act. The main purpose of the Act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted.<sup>42</sup> It was not intended by Congress in passing the Act to effect the exclusive regulation of railroads by providing a system controlling them complete in itself, but it must be construed in connection with other acts.<sup>43</sup> The reinforcement of the tariff laws was not the purpose of the Interstate Commerce Act.<sup>44</sup>

In so far as Elkins Act, Feb. 19, 1903, § 1, provided for punishment of corporate carriers in granting, and corporate shippers in knowingly accepting, rebates or discrimination from legal rates and tariffs, it was not abrogated or repealed by the Hepburn Act, June 29, 1906, but was preserved, and so far as it provided for the punishment of such acts when not knowingly done, it was repealed.<sup>45</sup> The payment of a rebate after the passage of Elkins Act, Feb. 19, 1903, but upon shipments of property transported prior

Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350; Interstate Commerce Commission v. Cincinnati, etc., R. Co., *supra*.

41. Texas & P. R. Co. v. Abilene Cotton Oil Co., *supra*; Interstate Commerce Commission v. Cincinnati, etc., R. Co., *supra*; Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 184.

42. Harriman v. Interstate Commerce Commission, 211 U. S. 407, 29 Sup. Ct. 115.

43. United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540; Meeker v. Lehigh Val. R. Co., 162 Fed. 354.

44. Texas & Pac. R. Co. v. Interstate Commerce Commission, *supra*.

45. Great Northern Ry. Co. v. United States, 155 Fed. 945, 84 C. C. A. 93, judg. affd. 208 U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. —.

to that enactment, is comprehended by its provisions that it shall be unlawful to offer, grant, or give, or to solicit, accept, or receive any rebate in respect to property in interstate commerce transportation, whereby any such property shall be transported at less than the published rates.<sup>46</sup> Under Rev. St. U. S., 1901, § 13, providing that the repeal of any statute shall not operate as a release from liability incurred under such statute unless the repealing act shall expressly so provide, the saving clause contained in the Hepburn Act, June 29, 1906, § 10, relating to interstate commerce, did not repeal Elkins Act, Feb. 19, 1903, § 1, in so far as it affected an indictable offense thereunder, previously committed.<sup>47</sup> By the provisions of Hepburn Act, June 29, 1906, § 1, amendatory of Interstate Commerce Act, Feb. 4, 1887, § 1, that "the term 'common carrier' as used in this act shall include express companies," such companies are made subject to all provisions of said Interstate Commerce Act and its amendments, so far as the same may be applicable, including the provisions of sections 2 and 3, against unjust and unreasonable discriminations, of section 6, as amended by the Hepburn Act, prohibiting the taking of any greater or less sum for transportation of property than that named in the tariffs filed, and section 1 of the Elkins Act, as so amended, making it unlawful to offer or accept any rebate from the published rate, or other discrimination in respect of the transportation of any property whereby any advantage is gained.<sup>48</sup> The fact that a pass is issued under an established contract, valid when made, does not exempt the parties from the operation of Interstate Commerce Act, Feb. 4, 1887, as amended June 29, 1906.<sup>49</sup> An agreement by an interstate carrier to issue annual passes for life

46. *New York Cent., etc., R. Co. v. United States*, 212 U. S. 500, 29 Sup. Ct. 309, 53 L. Ed. —, affg. judg. *United States v. New York Cent., etc., R. Co.*, 146 Fed. 293.

47. *United States v. New York Cent., etc., R. Co.*, 153 Fed. 630.

48. *United States v. Wells-Fargo Co.*, 161 Fed. 606.

49. *Gill v. Erie R. Co.*, 135 N. Y. Supp. 355, 151 App. Div. 131, reargument and appeal to Court of Appeals denied, 136 N. Y. Supp. 1135.

in consideration of a release of a claim for damages, though entered into prior to Act June 29, 1906, was made unenforceable by the prohibition of section 6 of that act, against demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in the carrier's published schedule of rates.<sup>50</sup>

## § 6. Carriers subject to the act.

The carriers subject to the Interstate Commerce Act are those engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used,<sup>51</sup> under a common control, management, or arrangement, for a continuous carriage or shipment,<sup>52</sup> from one State or territory of the United States, or the District of Columbia, to any other State or territory of the United States, or the District of Columbia, or from any place in the United States through a foreign country to any other place in the United States, and also in the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from

50. *Louisville & N. R. Co. v. Motley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. —, revg. decree 133 Ky. 652, 118 S. W. 982.

51. *United States v. Morsman*, 42 Fed. 448, only railway carriers are included.

Where commerce is carried by way of the high seas, though from one point in a State to another in the same State, it is under federal control. *Lord v. Steamship Co.*, 102 U. S. 541. But see *New Orleans Exch. v. Ry. Co.*, 2 Int. Com. C. Rep. 375; *State v. Ry. Co. (Minn.)*, 41 N. W. 1047.

Carrying passengers on a steamboat is not interstate commerce, al-

though the boat may touch the shores of different States. *State v. Seagraves (Mo.)*, 85 S. W. 925.

52. *Cincinnati, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 184; *Trammell v. Clyde Steamship Co.*, 5 Int. Com. C. Rep. 324; *Boston Fruit, etc., Exch. v. New York, etc., R. Co.*, 3 Int. Com. Rep. 493, 4 Int. Com. C. Rep. 664; *Ex parte Koehler*, 30 Fed. 867; *Interstate Commerce Com. v. Cincinnati, etc., R. Co.*, 56 Fed. 925; *Ft. Worth, etc., R. Co. v. Whitehead*, 6 Tex. Civ. App. 595; *Re Annapolis, etc., R. Co.*, 1 Int. Com. Rep. 315; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. 912.

such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.<sup>53</sup> The act is intended to regulate all the commerce subject to the exclusive jurisdiction of the United States, including the agents and instrumentalities employed and the commodities carried, with only the limitations provided in the act itself.<sup>54</sup> It has no application to the transportation of passengers or property, or to the receiving, delivering, storing or handling of property, wholly within one State, and not shipped to a foreign country from any State or territory or from a foreign country to any State or territory.<sup>55</sup> It does not apply to any water craft unless it is used in connection with a railway for transportation between the places, in the manner, and by the carriers described in the act.<sup>56</sup> The original act did not apply to transfer and switching companies,<sup>57</sup> or independent express companies,<sup>58</sup> or bridge or ferry companies,<sup>59</sup> or stock yards companies,<sup>60</sup> not operating railway lines. But a railroad company conducting the express business was subject to the act.<sup>61</sup>

**53.** Interstate Commerce Act, § 1; Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197, carriage through foreign country: Interstate Commerce Com. v. Brimson. 154 U. S. 457.

**54.** Mattingly v. Pennsylvania Co., 2 Int. Com. Rep. 806. 3 Int. Com. C. Rep. 592; Savery v. New York Cent., etc., R. Co., 2 Int. Com. Rep. 210. 2 Int. Com. C. Rep. 338, the act does not extend to immigrants arriving at the port of New York for interior points.

**55.** New Jersey Fruit Exch. v. Central R. Co., 2 Int. Com. Rep. 84, 2 Int. Com. C. Rep. 142; Missouri, etc., Co. v. Cape Girardeau, etc., R. Co.,

1 Int. Com. Rep. 607, 1 Int. Com. C. Rep. 30. See also cases cited in preceding notes to this section.

**56.** Re Joint Water, etc., Lines, 2 Int. Com. Rep. 486. 2 Int. Com. C. Rep. 645.

**57.** Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 567.

**58.** Southern Indiana Express Co. v. United States Express Co., 92 Fed. 1022, 35 C. C. A. 172, 88 Fed. 659.

**59.** Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 567, but a railway company using a bridge is subject to the act.

**60.** Cotting v. Kansas City Stock Yards Co., 82 Fed. 839.

**61.** Pacific Express Co. v. Seibert,



Broadly speaking Elkins Act, Feb. 19, 1903, is not applicable to carriers by water, and such a carrier does not become subject to the act in respect to an interstate shipment in part over its line and in part over connecting railroad lines, unless, as provided in section 1 thereof, it was "under a common control, management or arrangement" with the railroad carriers for the continuous carriage of such shipment.<sup>62</sup> Under Interstate Commerce Act, Feb. 4, 1887, § 1, as amended by Act June 29, 1906, providing that the act applies to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, etc., for a continuous carriage or interstate shipment, the act does not apply to a truckman in a city, so as to make him responsible for the loss of goods shipped from one state to another on the theory that he was the initial carrier, when his engagement was only to haul the goods from the store to the dock or depot as an independent employment.<sup>63</sup> A railway company operating as

44 Fed. 310; *United States v. Morsman*, 42 Fed. 448; *Re Express Co.*, 1 Int. Com. Rep. 677.

62. *Mutual Transit Co. v. United States*, 178 Fed. 664, 102 C. C. A. 164.

A carrier by water which has not joined in a tariff and division sheet filed and published by connecting railroad carriers for the through carriage of interstate shipments between two points does not become a party to a "common arrangement" for the carriage of such a shipment within the meaning of Elkins Act, Feb. 19, 1903, § 1, by accepting and carrying the same under a through bill of lading issued by the initial railroad carrier stating the published tariff rate and the division of the charges in accordance therewith, nor by re-

ceiving its divisional part of such rate, where it had previously privately contracted with the shipper to "protect" a lower through rate, pursuant to which contract the shipment was made, and its return to the shipper of a part of its divisional share of the freight paid, in fulfillment of the contract, was not the "giving of a rebate" in violation of the act. *Id.*

Where goods are received in transit under a "conventional division of the charges," there is an apportionment of the charges by agreement of the participating carriers, *Id.*

63. *Hirsch v. New England Nav. Co.*, 113 N. Y. Supp. 395, 129 App. Div. 178.

lessee for division of profits a railroad system owned by a stockyard company for the transportation of cars to and from trunk lines is an interstate carrier within Interstate Commerce Act, Feb. 4, 1887, and obliged to file its tariffs with the Interstate Commerce Commission as required by section 6.<sup>64</sup> A corporation maintaining a stockyard which operates a railroad system for cars to and from trunk lines in the course of their transportation from beyond the state is an interstate railway carrier within Interstate Commerce Act, Feb. 4, 1887, and obliged to file its tariffs with the Interstate Commerce Commission under section 6 of the act; and a stockyard company operating such a railroad system did not cease to be an interstate carrier within Interstate Commerce Act, Feb. 4, 1887, and as such obliged to file its tariffs under section 6 of the act, by leasing its railway to another corporation for a division of the profits.<sup>65</sup> A joint-stock company doing a general express business, having filed its schedule of rates with the Interstate Commerce Commission, is a *quasi* corporation, and subject to indictment as a legal entity for discrimination and violation of the Interstate Commerce Act, as amended by the Hepburn Act.<sup>66</sup> Interstate Commerce Act, Feb. 4, 1887, or its amendments, Act June 29, 1906, being acts to regulate commerce, do not apply to street railway companies engaged in the transportation of passengers between cities in different States.<sup>67</sup> A company operating a mere switching railway, transporting cars to and from trunk lines upon the basis of a division of the profits, may be an interstate carrier.<sup>68</sup> The amendment of section 1 of the Interstate Commerce Act by Act June 29, 1906, § 1, providing that the act shall apply to owners

64. *United States v. Union Stockyard & Transit Co. of Chicago*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. —, modfg. judg. (Com. Ct.) 192 Fed. 330.

65. *United States v. Union Stockyard & Transit Co. of Chicago*, *supra*.

66. *United States v. American Express Co.*, 199 Fed. 321.

67. *Omaha, etc., St. Ry. Co. v. Interstate Commerce Commission*, 179 Fed. 243.

68. *W. H. Aton Piano Co. v. Chicago, etc., Ry. Co.*, 152 Wis. 156, 139 N. W. 743.

of oil pipe lines, who shall be considered common carriers, is not ambiguous, and is intended to apply to all owners of interstate oil pipe lines, regardless of their previous status as common carriers, or as conducting a purely private business.<sup>69</sup> A terminal company which received cars of coal coming from another State, and delivered them within its yards to the engines of a railroad company, was engaged in moving interstate traffic, within Safety Appliance Act, March 2, 1893.<sup>70</sup> Congressional inaction is equivalent to a declaration that a carrier may, by its regulations, separate white and negro interstate passengers.<sup>71</sup> An interstate carrier is free to exercise all its common-law rights, except as prohibited by the Interstate Commerce Act, June 29, 1906.<sup>72</sup> When a carrier unites with one or more others in making a rate for interstate or foreign shipments, and a through bill is issued therefor, it is subject to the Interstate Commerce Act. An express agreement for the through rate is not required, but the successive receipt and forwarding in the ordinary course of business by two or more carriers under through bills, or any arrangement for a continuous carriage constitutes assent to such common arrangement, and makes the carrier a party to the contract, within the meaning of the act.<sup>73</sup> Kansas Comp. Laws, 1879, c. 23, § 57, known as the Maximum Freight

69. *Prarie Oil & Gas Co. v. United States*, 204 Fed. 798.

70. *United States v. Northern Pac. Terminal Co.*, 144 Fed. 861.

71. *Chiles v. Chesapeake & O. Ry. Co.*, 218 U. S. 71, 30 Sup. Ct. 667, 54 L. Ed. —, affg. judg. 125 Ky. 299, 101 S. W. 386.

72. *Union Pac. R. Co. v. Updike Grain Co.*, 178 Fed. 223, 101 C. C. A. 583.

73. *United States v. Wood*. 145 Fed. 405.

Plaintiff, desiring to ship sheep from S., in Oregon, to R., in Wyoming, inquired of the local agent at S. the amount of the through rate

to R., but, being dissatisfied, obtained a quotation showing the charges from S. to B. in Oregon and from B. to R. After the sheep were loaded, the agent notified plaintiff that it could not carry them under the last quoted rate, but that plaintiff must pay the rate originally quoted, which was, in fact, the regular tariff rate, and the sheep were transported in the same car from S. to R. without being in any manner transferred at B. It was held that it was an interstate shipment. *Baldwin Sheep & Land Co. v. Columbia Southern Ry. Co.*, 58 Or. 285, 114 P. 469.

Rate Law of 1868, had no application to fix or limit the charges for transportation of freight from another State into that State; because, if it was intended to apply to such interstate commerce, it was in violation of the Constitution U. S., art. 1, § 8, and therefore void.<sup>74</sup> Rev. St. Ohio, 1890, § 3320, requiring all railroad companies operating lines within the State to cause three, each way, of its regular passenger trains, if so many are run daily, to stop at a city or village containing over 3,000 inhabitants to receive and discharge passengers, etc., is a valid exercise of the police power of the State, and applies to an interstate railroad incorporated by and operating through such State, the federal government not having taken any affirmative action on the subject, under its powers to regulate interstate commerce.<sup>75</sup>

### § 7. Charges must be reasonable and just.

Section one of the Interstate Commerce Act provides that all charges made for any services rendered or to be rendered in the transportation of passengers or of property or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such services is prohibited and declared to be unlawful.<sup>76</sup> This has been held to be an express adoption by the national legislature of the principles of the common law.<sup>77</sup> In determining the reasonableness of rates the legitimate interests of carrying companies, as well as of traders and shippers, should be considered, whether they afford the carrier a proper return for the service rendered, as well as the result of the business to the shipper or producer of the traffic.<sup>78</sup> Common carriers may under

74. *Hardy v. Atchison, etc., R. Co.*, 32 Kan. 698, 5 Pac. 6.

75. *Lake Shore & M. S. Ry. Co. v. State of Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702.

76. *Interstate Commerce Com. v. Cincinnati, etc., R. Co.*, 167 U. S. 479;

*Interstate Commerce Com. v. Brimson*, 154 U. S. 447.

77. *Tift v. Southern R. Co.*, 123 Fed. 789.

78. *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197; *Loud v. South Carolina etc., R. Co.*, 4 Int.

this act make special contracts looking to the increase of their business, classify their traffic, adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally manage their important interests on the same principles which are recognized as sound and adopted in other trades and pursuits, subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage, or subject to undue prejudice or disadvantage, persons or traffic similarly circumstanced.<sup>79</sup> Whether their charges are reasonable or unreasonable is a question of fact.<sup>80</sup> The rate may be unreasonable because it is too low as well as because it is too high. In the one case it would be unjust

Com. Rep. 205; *Interstate Commerce Com. v. Alabama Midland R. Co.*, 74 Fed. 715; *Proctor v. Cincinnati, etc., R. Co.*, 3 Int. Com. Rep. 131, 4 Int. Com. C. Rep. 87; *Buchanan v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 655, 5 Int. Com. C. Rep. 7; *Martin v. Southern Pac. R. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; *Rice v. Western New York, etc., R. Co.*, 2 Int. Com. Rep. 298, 2 Int. Com. C. Rep. 389; *Hurlburt v. Lake Shore, etc., R. Co.*, 2 Int. Com. Rep. 81, 2 Int. Com. C. Rep. 122; *Potter Mfg. Co. v. Chicago, etc., R. Co.*, 5 Int. Com. C. Rep. 514; *Squire v. Michigan Cent. R. Co.*, 4 Int. Com. C. Rep. 611.

**Reasonableness affected by distance carried.**—*Manufacturers, etc., Union v. Minneapolis, etc., R. Co.*, 3 Int. Com. Rep. 115, 4 Int. Com. C. Rep. 79; *Lincoln Board of Trade v. Burlington, etc., R. Co.*, 2 Int. Com. Rep. 95, 2 Int. Com. C. Rep. 147; *Business Men's Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 41, 2 Int. Com. C. Rep. 52.

**Classification of freights.**—*Thurber v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 742, 3 Int. Com. C. Rep. 473; *Harvard Co. v. Pennsylvania Co.*, 3 Int. Com. Rep. 257, 4 Int. Com. C. Rep. 212; *Myers v. Pennsylvania Co.*, 2 Int. Com. Rep. 403, 2 Int. Com. C. Rep. 573; *New Orleans Cotton Exch. v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 777, 3 Int. Com. C. Rep. 534.

**Through and local rates.**—*Brady v. Pennsylvania R. Co.*, 2 Int. Com. Rep. 78, 2 Int. Com. C. Rep. 131; *Re Passenger Tariffs*, 2 Int. Com. Rep. 445, 2 Int. Com. C. Rep. 649.

**79.** *Interstate Commerce Com. v. Alabama M. R. Co.*, 74 Fed. 715, 21 C. C. A. 51, 41 U. S. App. 453, 5 Int. Com. Rep. 685, affg. 5 Int. Com. Rep. 308, 69 Fed. 227.

**80.** *Cincinnati, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 184; *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197.

to the stockholders, in the other to the shippers.<sup>81</sup> Interstate carriers have power to make commodity class rates and special class rates to meet the circumstances and conditions of traffic along their lines, and the market value of the commodities, the shipper's representations to the public as to their character, the volume of traffic, the special services by a carrier, such as the transportation of perishable freight, in fact, the interests of the carrier, the shipper and the general public, are to be considered.<sup>82</sup> Competition that affects rates should be considered as well in cases of traffic originating in foreign ports,<sup>83</sup> as in the case of traffic originating within the limits of the United States,<sup>84</sup> and in deciding whether rates and charges made at a low rate to secure freights, which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies, and the welfare of the community, which is to receive and consume the commodities, are to be considered. For a special service by the carrier requiring quick movement, prompt delivery at destination, special fitting up of cars, their withdrawal from other service, and their return empty on fast time, a higher rate than for the carriage of ordinary freight is reasonable and just, but it should bear

81. *Interstate Commerce Com. v. Cincinnati, etc., R. Co.*, 167 U. S. 511.

82. *New York Board of Trade v. Pennsylvania R. Co.*, 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447; *Warner v. New York, etc., R. Co.*, 3 Int. Com. Rep. 74, 4 Int. Com. C. Rep. 32; *Delaware State Grange, etc. v. New York, etc., R. Co.*, 3 Int. Com. Rep. 554, 4 Int. Com. C. Rep. 588; *Covington, etc., R. Co. v. Sandford*, 164 U. S. 578; *Perry v. Florida Cent., etc., R. Co.*, 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97; *Howell v. New York, etc., R. Co.*, 2 Int. Com. Rep. 162, 2 Int. Com. C. Rep. 272; *Riddle v. New York, etc., R. Co.*, 1 Int. Com. Rep. 787, 1 Int. Com. C. Rep. 594,

failure of shipper to secure profit not conclusive that rate is unreasonable; *Reagan v. Farmers L. & T. Co.*, 154 U. S. 162, failure of carrier to secure profit is not conclusive that rate is unjust and unreasonable.

83. *Interstate Commerce Com. v. Southern R. Co.*, 105 Fed. 703.

84. *Squire v. Michigan Cent. R. Co.*, 3 Int. Com. Rep. 515, 4 Int. Com. C. Rep. 611; *La Crosse Manufacturers', etc., Union v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 9; *Business Men's Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 41, 2 Int. Com. C. Rep. 52; *Interstate Commerce Com. v. Western, etc., R. Co.*, 93 Fed. 84.

a just relation to the value of the service to the traffic, and is not wholly in the discretion of the carrier.<sup>85</sup> So, carriers may charge lower rates under special conditions, as for carrying coal in summer months in order to keep its coal cars and coal crews employed,<sup>86</sup> or for the transportation of ten or more persons from the same place on "party rate tickets" at a rate less than that charged an individual for a like transportation,<sup>87</sup> provided such rates are offered in good faith to all persons upon equal terms. Equality of rates is the general policy of the law. In determining whether rates are just and reasonable in themselves, a comparison may be made between the particular rates charged and those accepted elsewhere for similar services, as for a longer and a shorter haul,<sup>88</sup> but the rates to other points are only circumstances to be considered in connection with other proof.<sup>89</sup> A finding that the rates charged by railroads for shipment to a particular point are unreasonable in themselves, cannot properly be based on evidence which only tends to show that they are too high as compared with the rates charged between the initial points and one or two other points.<sup>90</sup> A reduction in rates does not necessarily imply that former rates were unreasonable, as increase in volume of traffic and decrease in cost of transportation may account therefor.<sup>91</sup> So, an

85. Delaware State Grange, etc., Co. v. New York, etc., R. Co., 3 Int. Com. Rep. 561, 4 Int. Com. C. Rep. 605; Boston Fruit, etc., Exch. v. New York, etc., R. Co., 3 Int. Com. Rep. 493, 4 Int. Com. Rep. 664; Loud v. South Carolina R. Co., 5 Int. Com. C. Rep. 529.

86. Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409. See Interstate Commerce Com. v. Lehigh Valley R. Co., 74 Fed. 784, as to comparison of average cost of carriage on entire system with that on a particular line or part of the system.

87. Interstate Commerce Com. v.

Alabama Midland R. Co., 168 U. S. 165. And see cases cited note 8, § 6. *post*.

88. Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107.

89. Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409; Interstate Commerce Com. v. Western, etc., R. Co., 88 Fed. 186.

90. Interstate Commerce Com. v. Nashville, etc., R. Co., 120 Fed. 934, 57 C. C. A. 224.

91. Loud v. South Carolina R. Co., 5 Int. Com. C. Rep. 529.

advance in rates may be satisfactorily accounted for, but it may be held unjust where rates which have long been maintained are advanced where the traffic affected is large, important, and constantly increasing.<sup>92</sup> The fact that a railroad line operated as a part of a great railway system, considered as a separate road, fails to pay expenses, does not justify the charging of unjust and unreasonable rates nor undue discrimination in rates.<sup>93</sup>

### § 8. Unjust discrimination.

Section two of the Interstate Commerce Act provides in substance that if any common carrier subject to its provisions shall directly or indirectly, by any special rate, rebate, drawback, or other devices, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is thereby prohibited and declared to be unlawful.<sup>94</sup> This section was modeled on the "Equality Clause" of the

**92.** *Railroad Commission v. Savannah, etc., R. Co.*, 3 Int. Com. Rep. 414, 5 Int. Com. C. Rep. 13; *Coxe v. Lehigh Valley R. Co.*, 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535.

**93.** *Interstate Commerce Com. v. Louisville & N. R. Co.*, 118 Fed. 613.

The making of a through rate on shipments by the joint action of connecting railroads is the act of each, and brings each within the scope of the interstate commerce act, and renders it responsible for such rate, without regard to the proportion thereof received for its own service. *Id.*

**94.** *Interstate Commerce Com. v. Brimson*, 154 U. S. 447; *Mattingly v. Pennsylvania Co.*, 2 Int. Com. Rep. 806, 3 Int. Com. C. Rep. 592; *Interstate Commerce Com. v. Texas, etc., R. Co.*, 52 Fed. 187; *Cutting v. Florida R., etc., Co.*, 30 Fed. 663; *United States v. Egan*, 47 Fed. 112; *Re Underbilling*, 1 Int. Com. Rep. 813, 1 Int. Com. C. Rep. 633; *Heck v. East Tennessee, etc., R. Co.*, 1 Int. Com. Rep. 775, 1 Int. Com. C. Rep. 495.



English Railway act,<sup>95</sup> and its purposes is to enforce equality as to rates between shippers over the same line under substantially the same circumstances and conditions.<sup>96</sup> It does not include unjust discriminations as to conveniences and facilities, which is provided for in section three,<sup>97</sup> or discrimination as between localities.<sup>98</sup> One act of the carrier may, however, violate each of the first four sections of the act.<sup>99</sup> A shipper has, by the common law, a right of action for unjust discrimination in freight charges.<sup>1</sup> But mere inequality of rates, the charges of transportation being reasonable, did not constitute unjust discrimination under the common law,<sup>2</sup> as the rule is now under the Interstate Commerce Act, when the transportation is under substantially similar circumstances and conditions.<sup>3</sup> Actual discrimination in rates charged is necessary to constitute a violation of the Interstate Commerce Act; and the mere making or offering of a discriminating rate, under which it is not shown that any shipment was ever made, constitutes no legal injury to a shipper who is charged with a higher rate.<sup>4</sup> Only unjust and unreasonable discriminations are illegal, and where there is an adequate consideration for reduced rates, such rates are not an unjust discrimination.<sup>5</sup> It is not necessary

95. *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197.

96. *Interstate Commerce Com. v. Alabama Midland R. Co.*, 168 U. S. 144; *Wight v. United States*, 167 U. S. 512.

97. *United States v. Delaware, etc., R. Co.*, 40 Fed. 101, section three includes every form of unjust discrimination, including rates.

98. *Interstate Commerce Com. v. Western, etc., R. Co.*, 88 Fed. 186.

99. *Phillips v. Louisville & N. R. Co.*, 8 Int. Com. Rep. 93; *Interstate Commerce Com. v. Western, etc., R. Co.*, 93 Fed. 83, 35 C. C. A. 217.

1. *Murray v. Chicago, etc., R. Co.*, 92 Fed. 868, 35 C. C. A. 62; *State v.*

*Cincinnati, etc., R. Co.*, 47 Ohio St. 130; *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517, 38 N. E. 311, 18 L. R. A. 105; *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169; *Cook v. Chicago, etc., R. Co.*, 81 Iowa, 551.

2. *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263; *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 30 Fed. 2.

3. *United States v. Delaware, etc., R. Co.*, 40 Fed. 101. See also, *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226.

4. *Lehigh Valley R. Co. v. Rainey*, 112 Fed. 487.

5. *Inter-state Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S.

that a preference in rates should be brought about by means of some "device" to render it illegal,<sup>6</sup> but where a mere device is used to cover an intentional giving of a less rate it will render the transaction unlawful.<sup>7</sup> The burden is on the shipper to prove unjust discrimination where the rates are equal;<sup>8</sup> but the burden is on the carrier to justify the rates where they are unequal.<sup>9</sup> The proportion in which freight earned by two connecting railroads under a joint-tariff schedule is divided between them is a matter for their consideration alone, and cannot be taken cognizance of by a court for the purpose of determining that the share received by one constitutes an unjust and discriminative rate.<sup>10</sup> The classification of freights is not unlawful unless it is used as a device to cover unjust discrimination.<sup>11</sup> Freights are generally and properly classified according to expense of carriage, volume of business, weight, bulk, value, risk, competition, and other considerations affecting the cost and value of the transportation, and goods which are as matter of fact in the same class should be carried at the same rate.<sup>12</sup> Goods classified improperly as compared with the classi-

281; *Interstate Commerce Com. v. Texas, etc., R. Co.*, 52 Fed. 187.

6. *Seofield v. Lake Shore, etc., R. Co.*, 2 Int. Com. Rep. 67, 2 Int. Com. C. Rep. 90.

7. *Interstate Commerce Com. v. Chesapeake & O. Ry. Co.*, 128 Fed. 59.

8. *Brownell v. Columbus, etc., R. Co.*, 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638.

9. *McMorran v. Grand Trunk R. Co.*, 2 Int. Com. Rep. 604, 3 Int. Com. C. Rep. 254.

10. *Allen & Lewis v. Oregon R. & Nav. Co.*, 98 Fed. 16.

11. *Warner v. New York Cent. etc., R. Co.*, 3 Int. Com. Rep. 74, 4 Int. Com. C. Rep. 32; *New York Board of Trade v. Pennsylvania R. Co.*, 3 Int. Com. Rep. 417, 4 Int. Com.

C. Rep. 447; *Coxe v. Lehigh Valley R. Co.*, 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535; *Brownell v. Columbus, etc., R. Co.*, 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638.

12. *Independent Refiners Assoc. v. Western New York, etc., R. Co.*, 4 Int. Com. Rep. 162, 5 Int. Com. C. Rep. 415; *Board of Trade v. Chicago, etc., R. Co.*, 3 Int. Com. Rep. 233, 4 Int. Com. C. Rep. 158; *Anthony Salt Co. v. Missouri Pac. R. Co.*, 4 Int. Com. Rep. 33, 5 Int. Com. C. Rep. 299; *Martin v. Southern Pac. R. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; *Bates v. Pennsylvania R. Co.*, 2 Int. Com. Rep. 715, 3 Int. Com. C. Rep. 535; *Pyle v. East Tennessee, etc., R. Co.*, 1 Int. Com. Rep. 767, 1 Int. Com. C. Rep. 465; *New York Board*

fication of analogous goods constitutes unlawful discrimination.<sup>13</sup> Railway companies subject to the provisions of the Interstate Commerce Act are only bound to give equal rates to all persons for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and inequality of conditions or difference in circumstances justifies an equality of rates.<sup>14</sup> It devolves upon the carrier to determine in the first instance, in fixing and adjusting rates, whether substantially similar circumstances and conditions exist or the reverse,<sup>15</sup> and its action is subject to revision by the commission, and ultimately by the courts.<sup>16</sup> A difference in the cost or char-

of Trade v. Pennsylvania R. Co., 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447; Andrews Soap Co. v. Pittsburgh, etc., R. Co., 3 Int. Com. Rep. 77, 4 Int. Com. C. Rep. 41; Beaver v. Pittsburgh, etc., R. Co., 3 Int. Com. Rep. 564, 4 Int. Com. C. Rep. 733, soaps used for like purposes should receive the same classification and rates; McMorran v. Grand Trunk R. Co., 2 Int. Com. Rep. 604, 3 Int. Com. C. Rep. 252, grain and grain products should be classified the same; Kauffman Milling Co. v. Missouri Pac. R. Co., 3 Int. Com. Rep. 400, 4 Int. Com. C. Rep. 417, wheat and wheat flour belong to the same class; Rice v. Western New York, etc., R. Co., 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131, oil and its products belong to the same class; Reynolds v. Western New York, etc., R. Co., 1 Int. Com. Rep. 685, 1 Int. Com. C. Rep. 393, railroad ties and lumber should be classed the same.

13. Brownell v. Columbus, etc., R. Co., 4 Int. Com. Rep. 285, 5 Int. Com.

C. Rep. 638; Reynolds v. Western New York, etc., R. Co., *supra*.

14. Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 367; Gulf, etc., R. Co. v. Miami Steamship Co., 86 Fed. 407; Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409; Burton Stock Car Co. v. Chicago, etc., R. Co., 1 Int. Com. Rep. 329, 1 Int. Com. C. Rep. 132; Larrison v. Chicago, etc., R. Co., 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 147; United States v. Tozer, 39 Fed. 369; Cowan v. Bond, 39 Fed. 54. See also, cases cited, notes 58, 59 and 75 to this section.

Whether circumstances and conditions are substantially similar is a question of fact. Detroit, etc., R. Co. v. Interstate Commerce Com., 74 Fed. 803, 43 U. S. App. 308.

15. Interstate Commerce Com. v. Alabama Midland R. Co., 168 U. S. 169.

16. Louisville, etc., R. Co. v. Behlmer, 175 U. S. 648; Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107.

acter of the service may justify a difference in rates,<sup>17</sup> but no device, such as payment of unreasonable rent for use of cars furnished by shippers, can be practiced to evade the duty of equal charges for equal service.<sup>18</sup> In deciding as to the lawfulness of lower rates to import traffic than to domestic traffic, in order to secure foreign freights which would otherwise go by other competitive routes, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered. Ocean competition may constitute a dissimilar condition, and circumstances and conditions which exist beyond the seaboard of the United States can be legitimately regarded for the purpose of justifying a difference in rates charged by railroads between import and domestic traffic.<sup>19</sup> But competition between rival routes is a condition to be considered in reference to the phrase "under substantially similar conditions and circumstances," in the third and fourth sections relative to undue preferences and long and short hauls, rather than as used in this section, where it refers to the matter of carriage merely.<sup>20</sup> The term "a like kind of traffic," as used in this section, does not mean traffic that is identical, but traffic that is of "a like kind" with other freight in the elements of a fair and just classification for the purpose of arriving at a just and reasonable rate and a rate that will avoid unjust discrimination and unlawful preference.<sup>21</sup> The allowance by a railroad company to certain coal

17. *Interstate Commerce Com. v. Texas, etc., R. Co.*, 52 Fed. 187; *United States v. Delaware, etc., R. Co.*, 40 Fed. 101.

18. *Rice v. Western New York, etc., R. Co.*, 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131; *Re Relative Tank, etc., Rates on Oil*, 2 Int. Com. Rep. 245, 2 Int. Com. C. Rep. 365.

19. *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197. But see *Interstate Commerce Com. v.*

*Texas, etc., R. Co.*, 52 Fed. 189. Compare *Burlington, etc., R. Co. v. Northwestern Fuel Co.*, 31 Fed. 652; *Hays v. Pennsylvania Co.*, 12 Fed. 309.

20. *Wight v. United States*, 167 U. S. 512; *Interstate Commerce Com. v. Alabama Midland R. Co.*, 168 U. S. 144.

21. *New York Board of Trade v. Pennsylvania R. Co.*, 3 Int. Com. Rep. 427, 4 Int. Com. C. Rep. 447.

companies shipping over its line of a stated sum per ton ostensibly for the use of trackage owned by such companies and the service of their own locomotives in hauling cars thereon from the rate charged plaintiff, which was also a shipper in the same district under similar circumstances, was an unlawful discrimination, in violation of Interstate Commerce Act, Feb. 4, 1887, § 2.<sup>22</sup> Under section 2, which prohibits a carrier from charging to one shipper a greater or less compensation for a service than is charged to another for a like and "contemporaneous service," services rendered to a complaining and a favored shipper are "contemporaneous" as long as the discriminating rates remain in force, and for the purpose of comparison they need not be rendered on the same day, nor during the same week or month.<sup>23</sup>

### § 9. Unjust discrimination in specific cases.

A railroad company is not required by the interstate commerce act to give the same carload rates on interstate shipments to forwarding agents who solicit property for shipment from different owners, each having less than a carload, and combine it into carload lots, that it makes on carload shipments by a single owner;<sup>24</sup> nor the same rates on quantities less than carloads that it does on carload lots;<sup>25</sup> but an excessive difference in such rates which would destroy competition between large and small dealers is an

22. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 181 Fed. 403; appeal dismissed for want of jurisdiction, 183 Fed. 908.

23. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 181 Fed. 403; appeal dismissed for want of jurisdiction, 183 Fed. 908.

24. *Landquist v. Grand Trunk Western Ry. Co.*, 121 Fed. 915, the charges in such case not being for "a like and contemporary service in the transportation of a like kind of traffic

under substantially similar circumstances and conditions," so as to render the difference in the rates made an unlawful discrimination, under section 2 of the act.

25. *Murphy v. Wabash R. Co.*, 3 Int. Com. Rep. 725, 5 Int. Com. C. Rep. 122; *Brownell v. Columbus, etc., R. Co.*, 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638; *Thurber v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 742, 3 Int. Com. C. Rep. 473.

unlawful discrimination.<sup>26</sup> Discounts from schedule rates for large shipments constitute unjust discrimination,<sup>27</sup> but a guarantee of large quantities and full train loads at regular periods justifies a reduced rate, where the object of the carrier is to obtain a greater remunerative profit by the diminished cost of carriage.<sup>28</sup> Excessive mileage paid for the use of the shipper's cars amounts to a rebate and is an unjust discrimination, but a compensation for the use or rent of such cars, which will not put others at a disadvantage, is lawful.<sup>29</sup> An arbitrary manufacturer's rate to some persons and not to others is unlawful.<sup>30</sup> Group rates on shipments from all points within a certain territory do not, however, constitute unjust discrimination in favor of the more distant shippers as against those nearer the common terminus.<sup>31</sup> The doctrine that an estimated proportion of a through rate must not be less according to distance than the local rate from an intermediate point to another point named in the line covered by the through rate is untenable,<sup>32</sup> provided that the local rate is reasonable when

26. See cases cited in last preceding note.

27. *Providence Coal Co. v. Providence, etc., R. Co.*, 1 Int. Com. Rep. 363; 1 Int. Com. C. Rep. 107; *United States v. Tozer*, 39 Fed. 369.

28. *Interstate Commerce Com. v. Texas, etc., R. Co.*, 52 Fed. 187.

29. *Independent Refiners' Assoc. v. Western New York, etc., R. Co.*, 4 Int. Com. Rep. 162, 5 Int. Com. C. Rep. 415; *Rice v. Western New York, etc., R. Co.*, 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131; *Seo-field v. Lake Shore, etc., R. Co.*, 2 Int. Com. Rep. 67, 2 Int. Com. C. Rep. 90; *Shamberg v. Delaware, etc., R. Co.*, 3 Int. Com. Rep. 502, 4 Int. Com. C. Rep. 630; *Rice v. Louisville, etc., R. Co.*, 1 Int. Com. Rep. 722, 1 Int. Com. C. Rep. 503.

30. *Matter of Louisville, etc., R.*

*Co.*, 5 Int. Com. C. Rep. 466.

31. *Howell v. New York, etc., R. Co.*, 2 Int. Com. Rep. 162, 2 Int. Com. C. Rep. 272; *Rend v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 313, 2 Int. Com. C. Rep. 540; *Imperial Coal Co. v. Pittsburgh, etc., R. Co.*, 2 Int. Com. Rep. 436, 2 Int. Com. C. Rep. 618.

32. *Poughkeepsie Iron Co. v. New York Cent., etc., R. Co.*, 3 Int. Com. Rep. 248, 4 Int. Com. C. Rep. 195; *Coxe v. Lehigh Valley R. Co.*, 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535; *Interstate Commerce Co. v. Baltimore, etc., R. Co.*, 145 U. S. 281, 43 Fed. 37; *Milwaukee Chamber of Commerce v. Flint, etc., R. Co.*, 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; *Parsons v. Chicago, etc., R. Co.*, 63 Fed. 903, 137 U. S. 447; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. 912, rule applied to connecting lines.

compared with the through rate,<sup>33</sup> and that the provisions of section four as to long and short hauls is not violated.<sup>34</sup> The service rendered by a railroad company in transporting local passengers or freight from one point to another on its line is not identical with the service rendered in transporting through passengers or freight over the same rails, and the circumstances and conditions of carriage are substantially dissimilar.<sup>35</sup> Giving a rebate to a shipper which is denied to other shippers under similar conditions,<sup>36</sup> paying expenses of cartage to its station for one shipper and refusing to do so for others,<sup>37</sup> making an allowance to certain shippers for leakage and waste and denying it to others under similar circumstances,<sup>38</sup> giving lower rates for goods intended for reshipment beyond the point of destination,<sup>39</sup> and underbilling of goods generally, where the favored shipper pays less than is charged to others for the same service,<sup>40</sup> is an unjust discrimination within the meaning of the act. The issuing of a free pass for transportation from one State to another to a person not in the excepted class mentioned in section twenty-two,<sup>41</sup> selling mileage

33. *Lippman v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584.

34. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 47 Fed. 567.

35. *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197; *Union Pac. R. Co. v. United States*, 117 U. S. 355; *United States v. Tozer*, 39 Fed. 369.

36. *Interstate Commerce Com. v. Alabama M. R. Co.*, 168 U. S. 144; *Wight v. United States*, 167 U. S. 512; *Willoughby v. Chicago Junction R., etc., Co.*, 50 N. J. Eq. 656; *Matter of Louisville, etc., R. Co.*, 5 Int. Com. C. Rep. 466; *Matter of Grand Trunk R. Co.* 2 Int. Com. Rep. 496, 3 Int. Com. C. Rep. 89; *Bullard v. Northern Pac. R. Co.*, 10 Mont. 163, 45 Am. & Eng. R. Cas. 234.

37. *Hezel Milling Co. v. St. Louis, etc., R. Co.*, 3 Int. Com. Rep. 701, 5 Int. Com. C. Rep. 57; *Wight v. United States*, 167 U. S. 512; *Stone v. Detroit, etc., R. Co.*, 3 Int. Com. Rep. 60, 3 Int. Com. C. Rep. 613. But see *Detroit, etc., R. Co. v. Interstate Commerce Com.*, 74 Fed. 803.

38. *Rice v. Western New York, etc., R. Co.*, 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131; *Rice v. Cincinnati, etc., R. Co.*, 3 Int. Com. Rep. 841, 5 Int. Com. C. Rep. 193.

39. *Northwestern Iowa Grain, etc., Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 431; 2 Int. Com. C. Rep. 604.

40. *Re Underbilling*, 1 Int. Com. Rep. 813, 1 Int. Com. C. Rep. 633.

41. *Matter of Boston, etc., R. Co.*, 5 Int. Com. C. Rep. 69; *Harvey v.*

tickets for use by commercial travelers only and refusing them to other travelers at the same rate,<sup>42</sup> selling passenger tickets at reduced rates through brokers or "scalpers" under pretence of paying a commission,<sup>43</sup> and giving special rates to certain points to immigrants which are less than half the rates charged the public generally for the same service,<sup>44</sup> has been held to constitute an unjust discrimination. But a class rate may be made for immigrants which is denied to others, where the accommodations provided are different from those provided for other travelers.<sup>45</sup> Selling a round-trip ticket for a less rate than a one-way ticket is not an unjust and unreasonable discrimination.<sup>46</sup> The sale of party-rate tickets for the transportation of ten or more persons at a reduced rate from that charged an individual for a like transportation on the same trip is not an unjust discrimination, provided such tickets are offered to the public generally and the rate charged single passengers is reasonable, the transportation in the two cases not being substantially identical.<sup>47</sup> The refusal to give to the government of the United States, in buying transportation on a railroad for its soldiers, in lots of ten or more, a re-

Louisville, etc., R. Co., 3 Int. Com. Rep. 793, 5 Int. Com. C. Rep. 153; Slater v. Northern Pac. R. Co., 2 Int. Com. Rep. 243, 2 Int. Com. C. Rep. 359; Griffie v. Burlington, etc., R. Co., 2 Int. Com. Rep. 194, 2 Int. Com. C. Rep. 301; *In re Charge to Grand Jury*, 66 Fed. 146; *Ex parte Koehler*, 31 Fed. 315.

42. *Larrison v. Chicago, etc., R. Co.*, 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 147; *Associated Wholesale Grocers v. Missouri Pac. R. Co.*, 1 Int. Com. Rep. 393, 1 Int. Com. C. Rep. 156.

43. *Re Passenger Tariffs, etc.*, 2 Int. Com. Rep. 340, 2 Int. Com. C. Rep. 513.

44. *Elvey v. Illinois Cent. R. Co.*,

2 Int. Com. Rep. 804, 3 Int. Com. C. Rep. 652.

45. *Savery v. New York Cent., etc., R. Co.*, 2 Int. Com. C. Rep. 338.

46. *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263.

47. *Interstate Commerce Com. v. Alabama M. R. Co.*, 168 U. S. 165; *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197; *Foster v. Cleveland, etc., R. Co.*, 56 Fed. 434; *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263, 43 Fed. 37. But see *Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co.*, 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465; *Re Passenger Traffic*, 2 Int. Com. Rep. 445, 2 Int. Com. C. Rep. 513.



duced ten-party rate given by the railroad company's schedule to "theatrical, operatic, or concert companies, hunting and fishing parties, glee clubs, brass and string bands, boat, baseball, polo or tennis clubs, football teams, and other parties of like character," did not constitute an unjust discrimination against it, or subject it to undue prejudice or disadvantage, in violation of the Interstate Commerce Act, where it is shown that the purpose and effect of the party rate given by the schedule is to increase the company's business, and that tickets sold thereunder are closely limited in time, and are paid for in cash in advance, while those furnished to the government are not so limited, are furnished on a requisition, and are only paid for after indefinite delay in the auditing and allowance of the claims by the War and Treasury Departments. In such case the conditions and circumstances under which the service is rendered are essentially different, and justify the making of different rates.<sup>48</sup>

#### § 10. Undue or unreasonable preference or advantage.

Section three of the Interstate Commerce Act makes it unlawful for any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.<sup>49</sup> The purpose of this section is to prevent unjust

48. *United States v. Chicago, etc., R. Co.*, 127 Fed. 785, 62 C. C. A. 465; *Detroit, etc., R. Co. v. Interstate Commerce Com.*, 74 Fed. 803; *Cincinnati, etc., Ry. Co. v. Interstate Commerce Com.*, 162 U. S. 184.

49. *Interstate Commerce Com. v. Brimson*, 154 U. S. 447; *United States v. Delaware, etc., R. Co.*, 40

Fed. 101; *Macloon v. Chicago, etc., R. Co.*, 3 Int. Com. Rep. 711, 5 Int. Com. C. Rep. 84; *Mattingly v. Pennsylvania Co.*, 2 Int. Com. Rep. 806, 3 Int. Com. C. Rep. 592.

This section is substantially the same as the provision of the English Traffic Act, and the construction given by the English courts to the

discriminations in favor of or against any party or place, by requiring carriers to give rates that are not only reasonable in themselves but relatively equal and reasonable.<sup>50</sup> But although railroads may not discriminate against the people of any one State, they are not necessarily bound to give absolutely the same rates to the people of all the States, because the kind and the amount of business and the cost thereof vary in the several States.<sup>51</sup> Carriers cannot discriminate for the purpose of bringing about commercial equality, or make rates so as to deprive one place of its natural advantages over another, or so as to build up one place or section at the expense of another.<sup>52</sup> It is neither sound in principle nor equitable in practice for railway lines to create artificial differences in market conditions by an arbitrary differential in rates, whereby the product of one section of the country is assigned to

language of that act will be presumed to have been adopted with the adoption of the language of that act. *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 284; *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197.

50. *Milwaukee Chamber of Commerce v. Chicago, etc., R. Co.*, 7 Int. Com. Rep. 48; *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857; *Manufacturers, etc., Union v. Minneapolis, etc., R. Co.*, 3 Int. Com. Rep. 115, 4 Int. Com. C. Rep. 79; *Detroit Board of Trade v. Grand Trunk R. Co.*, 2 Int. Com. Rep. 199, 2 Int. Com. C. Rep. 315; *Re Tariff of Transcontinental Lines*, 2 Int. Com. Rep. 203, 2 Int. Com. C. Rep. 324; *Toledo Produce Exch. v. Lake Shore, etc., R. Co.*, 3 Int. Com. Rep. 830, 5 Int. Com. C. Rep. 166; *Boards of Trade Union v. Chicago, etc., R. Co.*, 1 Int. Com. Rep. 608, 1 Int. Com. C. Rep. 215; *Boston*

*Chamber of Commerce v. Lake Shore, etc., R. Co.*, 1 Int. Com. Rep. 754, 1 Int. Com. C. Rep. 436; *Bates v. Pennsylvania R. Co.*, 2 Int. Com. Rep. 715, 3 Int. Com. C. Rep. 435.

51. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, 171 U. S. 361, 18 Sup. Ct. 888.

52. *Commercial Club v. Chicago, etc., R. Co.*, 6 Int. Com. Rep. 647; *Eau Claire Board of Trade v. Chicago, etc., R. Co.*, 4 Int. Com. Rep. 65, 5 Int. Com. C. Rep. 264; *Potter Mfg. Co. v. Chicago, etc., R. Co.*, 4 Int. Com. Rep. 223, 5 Int. Com. C. Rep. 514; *Chamber of Commerce v. Great Northern R. Co.*, 5 Int. Com. C. Rep. 71; *Raymond v. Chicago, etc., R. Co.*, 1 Int. Com. Rep. 627, 1 Int. Com. C. Rep. 230; *Milwaukee Chamber of Commerce v. Flint, etc., R. Co.*, 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; *James v. Canadian Pac. R. Co.* 5 Int. Com. C. Rep. 612.

one market and the product of another section to another market.<sup>53</sup> The Act to Regulate Commerce applies, not only in case of direct injury to particular individuals or industries, but also in cases involving indirect injury to the community as a whole; and in the absence of some justifying reason it will be improper for American railroads to permanently transact business for foreigners at a less rate than that for which they render a corresponding service to American citizens.<sup>54</sup> Railway companies are not prohibited from preferring one person or one locality to another,<sup>55</sup> nor is a preference or advantage in a given case necessarily unlawful,<sup>56</sup> unless it amounts to an undue or unreasonable one.<sup>57</sup> What is undue or unreasonable preference or advantage is not defined by the act, but it has been held to consist of doing or allowing to one party or place what is denied to another party or place under substantially the same circumstances and conditions.<sup>58</sup> The questions whether a preference by railroad companies in freight rates charged, in favor of certain persons or localities as opposed to others, is undue or unreasonable, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are ones of fact in each individual case dependent upon the proofs.<sup>59</sup> The commission

53. *Re Export Rates*, 8 Int. Com. Rep. 185.

54. *Re Export & D. Rates*, 8 Int. Com. Rep. 214.

55. *New York Produce Exch. v. Baltimore & O. R. Co.*, 7 Int. Com. Rep. 612.

56. *Interstate Commerce Com. v. Cincinnati, etc., R. Co.*, 124 Fed. 624; *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197; *Interstate Commerce Com. v. Alabama M. R. Co.*, 74 Fed. 175; *Denaby Main Colliery Co. v. Manchester, etc., R. Co.*, 11 App. Cas. 97.

57. *New York Produce Exch. v. Bal-*

*timore & Ohio R. Co.*, 7 Int. Com. Rep. 612; *Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co.*, 61 Fed. 158, 51 Fed. 465; *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 59 Fed. 402; *Interstate Commerce Com. v. Texas, etc., R. Co.*, 52 Fed. 187.

58. *Martin v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 32, 2 Int. Com. C. Rep. 25; *Crews v. Richmond, etc., R. Co.*, 1 Int. Com. Rep. 703, 1 Int. Com. C. Rep. 401; *Little Rock, etc., R. Co. v. St. Louis Southwestern R. Co.*, 63 Fed. 775; *Cowan v. Bond*, 39 Fed. 74.

59. *New York Produce Exch. v. Baltimore & O. R. Co.*, 7 Int. Com. Rep.

must ascertain the facts.<sup>60</sup> The burden of proof is with the complaining party to prove an undue preference or prejudice.<sup>61</sup> In considering and determining the question of undue preference or advantage to persons or traffic, the value of the goods, the cost of the service, the degree of risk to the carrier, among other considerations, have an important bearing on the relation of the rates on different kinds of traffic, as well as the reasonableness of a rate on a specified article.<sup>62</sup> Other elements to be considered are the fair interest of the carriers, the welfare of communities, the situation and circumstances of customers, whether competitive or otherwise, the relative volumes of the traffic involved, and the relative cost of carriage and profit to the carrier.<sup>63</sup> In cases involving a difference in the rates between two points of shipment the mileage is a circumstance to be considered with other facts and conditions, but is not controlling or the most important.<sup>64</sup> The public benefits, the greater volume of business warranting lower rates and competition furnish reasons which sometimes outweigh the mere consideration of distance.<sup>65</sup> In considering the question of undue preference or advantage between localities, the welfare

612; Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184; Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197; United States v. Tozer, 39 Fed. 369; Interstate Commerce Com. v. Alabama M. R. Co., 168 U. S. 170.

60. Riddle v. Baltimore, etc., R. Co., 1 Int. Com. Rep. 778, 1 Int. Com. C. Rep. 608.

61. Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409; Interstate Commerce Com. v. Baltimore, etc., R. Co., 43 Fed. 37.

62. Colorado Fuel & I. Co. v. Southern Pac. Co., 6 Int. Com. Rep. 488.

63. Interstate Commerce Com. v. Alabama M. R. Co., 168 U. S. 144, 74 Fed. 715; Interstate Commerce Com.

v. Baltimore, etc., R. Co., 145 U. S. 284, 43 Fed. 51; Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197; Boston Chamber of Commerce v. Lake Shore, etc., R. Co., 1 Int. Com. Rep. 754, 1 Int. Com. C. Rep. 436.

64. Interstate Commerce Com. v. Louisville & N. R. Co., 73 Fed. 409.

65. Eau Claire Board of Trade v. Chicago, etc., R. Co., 4 Int. Com. Rep. 65, 5 Int. Com. C. Rep. 264; Detroit Board of Trade v. Grand Trunk R. Co., 2 Int. Com. Rep. 199, 2 Int. Com. C. Rep. 315; Imperial Coal Co. v. Pittsburgh, etc., R. Co., 2 Int. Com. Rep. 436, 2 Int. Com. C. Rep. 618; McMorran v. Grand Trunk R. Co., 2 Int. Com. Rep. 604, 3 Int. Com. C. Rep. 252.

of the communities occupying the localities where goods are to be delivered is to be considered, as well as that of the communities which are in the locality of the place of shipment.<sup>66</sup> Differences in population and tonnage traffic may justify a difference in rates which would otherwise constitute an unlawful preference or advantage.<sup>67</sup> A local charge of a greater rate than its proportion of a through joint rate charge on the same article under an arrangement between connecting carriers does not violate the provision against preferential rates.<sup>68</sup> Collection and delivery are not required to be alike at places grouped under the same rate.<sup>69</sup> The right of one locality to equal rates with another is not diminished by municipal subscription for the building of the road.<sup>70</sup> The circumstances of competition at one of two places, the rates to which from a third place made by a carrier are claimed to be discriminating, must be taken into consideration in determining as to such discrimination and the reasonableness of the rates.<sup>71</sup> Any fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge.<sup>72</sup> But competition, if it is shown to exist, must be such as to be a controlling factor.<sup>73</sup>

66. *Texas & P. R. Co. v. Interstate Commerce Com.*, 162 U. S. 197; *Interstate Commerce Com. v. Alabama M. R. Co.*, 168 U. S. 165.

67. *Detroit, etc., R. Co. v. Interstate Commerce Com.*, 74 Fed. 832; *Martin v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 32, 2 Int. Com. C. Rep. 25.

68. *Tozer v. United States*, 52 Red. 917; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. 912. See also, *Perry v. Florida Cent., etc., R. Co.*, 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97.

69. *Detroit, etc., R. Co. v. Interstate Commerce Com.*, 74 Fed. 803.

70. *Lincoln Board of Trade v. Burlington, etc., R. Co.*, 2 Int. Com. Rep. 95, 2 Int. Com. C. Rep. 147.

71. *Interstate Commerce Com. v.*

*Louisville & N. R. Co.*, 73 Fed. 409; *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197; *Manufacturers, etc., Union v. Minneapolis, etc., R. Co.*, 3 Int. Com. Rep. 115, 4 Int. Com. C. Rep. 79; *King v. New York, etc., R. Co.*, 3 Int. Com. Rep. 272, 4 Int. Com. C. Rep. 251; *New Orleans Cotton Exch. v. Cincinnati, etc., R. Co.*, 2 Int. Com. Rep. 289, 2 Int. Com. C. Rep. 375.

72. *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 283.

73. *James v. Canadian Pac. R. Co.*, 4 Int. Com. Rep. 274, 5 Int. Com. C. Rep. 612; *Interstate Commerce Com. v. Alabama M. R. Co.*, 168 U. S. 167, 74 Fed. 715; *Interstate Commerce*

### § 11. Undue preference in particular cases.

Section three of the Interstate Commerce Act does not refer solely to facilities offered to shippers, but also to rates, and a discrimination in rates may constitute an undue preference or advantage within the meaning of this section.<sup>74</sup> A contract by an interstate carrier to furnish another carrier a certain amount of coal at a fixed price, where it appeared that the cost of the coal to the defendant added to the cost of transportation and discharge beyond its own line, and the freight over its own line at the published rates, exceeded the price received by a substantial sum, operated to give the purchaser an undue preference or advantage, or to subject some one or more parties concerned in other sales or shipments to undue prejudice or disadvantage, and was a violation of this section.<sup>75</sup> A through rate does not unjustly discriminate against an intermediate point or against local shippers because less, proportionally, than the rate from such point to the common destination.<sup>76</sup> Charging a greater rate for a shorter haul than for a longer one may constitute an undue preference or advantage under the third section, although undue preferences or advantages of this kind are specifically prohibited by the fourth section of the act.<sup>77</sup> But if such a charge is valid under the fourth

Com. v. Western, etc., R. Co., 93 Fed. 83.

74. United States v. Tozer, 2 Int. Com. Rep. 597; United States v. Delaware, etc., R. Co., 40 Fed. 101.

75. Interstate Commerce Com. v. Chesapeake & O. Ry. Co., 128 Fed. 59 such contract was illegal and unenforceable. See also Interstate Commerce Com. v. Chesapeake & O. Ry. Co., 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515, modifying the decision in the case first cited by enjoining the taking of less than the published tariff of freight rates by means of

dealing in the purchase and sale of coal, and affirming it, as modified.

76. Milwaukee Chamber of Commerce v. Flint, etc., R. Co., 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; Lippman v. Illinois Cent. R. Co., 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584; Poughkeepsie Iron Co. v. New York Cent., etc., R. Co., 3 Int. Com. Rep. 248, 4 Int. Com. C. Rep. 195; Parsons v. Chicago, etc., R. Co., 63 Fed. 903.

77. Raworth v. Northern Pac. R. Co., 3 Int. Com. Rep. 857, 5 Int. Com. C. Rep. 234; Lehmann v. Texas, etc.,

section, because of a dissimilarity of circumstances and conditions, it is valid under the third section.<sup>78</sup> Cars must be furnished equally to all shippers and it is the legal duty of a railroad company, under the provisions of section three, in furnishing cars to coal mines along its line where a limited number only can be supplied, to distribute the same impartially, without unjust discrimination or favoritism;<sup>79</sup> and such distribution should be based on a disinterested and intelligent examination by experts of the different mines, and upon a consideration of all the factors which go to make up their capacity, both actual and potential, the most important being the number of workings and their capacity for production, the equipment in use for handling and loading the product being secondary, because it may be readily and quickly increased if necessary to meet the requirements.<sup>80</sup> A shipper is not entitled to have his cattle carried in cars of a special construction, belonging to a third party, and superior to ordinary cattle cars, because of the fact that the carrier transports some cattle in other cars available to all shippers equally, which have some of the improvements of the former, but are furnished by another party under a special contract, and which, unlike the cars desired by the shipper by reason of their peculiar construction, can be used in the chief business of the road, that of carrying

R. Co., 3 Int. Com. Rep. 706, 5 Int. Com. C. Rep. 44; Interstate Commerce Com. v. Western, etc., R. Co., 93 Fed. 83, 88 Fed. 136; Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107.

78. Interstate Commerce Com. v. Cincinnati, etc., R. Co., 56 Fed. 925; Interstate Commerce Com. v. Western, etc., R. Co., 88 Fed. 104.

79. United States v. West Virginia Northern R. Co., 125 Fed. 252; United States v. Norfolk, etc., R. Co., 109 Fed. 831, a system of coal-car distribution which a railroad has an-

plied in a given field, if that system, under the circumstances and conditions peculiar to that field, be a reasonable one, and fair to all, and is applied to all alike, affords no just cause of complaint on the part of any shipper; Riddle v. New York, etc., R. Co., 1 Int. Com. Rep. 787, 1 Int. Com. C. Rep. 594.

80. West Virginia Northern R. Co. v. United States, 134 Fed. 198, 67 C. C. A. 220, aff'g 125 Fed. 252.

81. United States v. Delaware, etc., R. Co., 40 Fed. 101, 2 Int. Com. Rep. 617.

coal, when not in use for cattle, and the refusal to use the cars desired by the shipper is not unjust discrimination.<sup>81</sup> It is not an unlawful discrimination for a carrier to prefer itself in the conduct of its own proper business as against a rival carrier,<sup>82</sup> or to protect itself from physical or mechanical disadvantages, where its action is not a mere colorable device to evade the act.<sup>83</sup> A dissimilarity of circumstances which will justify cartage service at one point without extra charge and not at another, not in mercantile rivalry with the former, is created by the fact of a custom established and in adoption at the former place for many years prior to the passage of the Interstate Commerce Act, to abandon which, on account of the distant location of the station from the business portion of the town, would occasion enormous expense to secure traffic which would otherwise go to rival lines.<sup>84</sup> The issuing of a free pass to a person not within the exceptions of section 22 is an unlawful preference.<sup>85</sup> A party-rate ticket, which is a single ticket covering the transportation of ten or more persons from one place to another, is not in violation of this section, although sold at a reduction from the regular passenger rates.<sup>86</sup> The exercise by a railway company of the right to pre-payment of charges or to retain a lien upon the goods until payment is made, or to hold the consignee responsible in case of delivery before payment, or the waiver of some of such rights at different

82. *Ilwaco R., etc., Co. v. Oregon Short Line, etc., R. Co.*, 57 Fed. 673; *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 47 Fed. 771.

83. *Detroit, etc., R. Co. v. Interstate Commerce Com.*, 74 Fed. 803.

84. *Detroit, etc., R. Co. v. Interstate Commerce Com.*, 74 Fed. 803.

85. *Re Charge to Grand Jury*, 66 Fed. 146. But the act does not apply to passes issued for a money or other valuable consideration, *Curry v. Kansas, etc., R. Co.*, 58 Kan. 6, 48 Pac. 579.

86. *Interstate Commerce Com. v. Alabama M. R. Co.*, 168 U. S. 144; *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263; *Foster v. Cleveland, etc., R. Co.*, 56 Fed. 434, a guaranty by a railroad company to an opera troupe transported over its line, of arrival at destination at a certain time, is not unlawful discrimination, although the transportation is had upon party-rate tickets.



times, cannot be construed to be a denial of equal facilities or a discrimination.<sup>87</sup> A refusal by a carrier to all persons and all points alike of a through rate with the privileges of interrupting the transit at an intermediate point and re-shipping the goods, is not a discrimination, although it operates in favor of one place and against another.<sup>88</sup>

## § 12. Preferences and discriminations.—In general.

The Interstate Commerce Act, Feb. 4, 1887, § 3, authorizes a preference, advantage, or discrimination between persons, localities, or traffics, provided such preference, advantage, or discrimination be not undue or unreasonable.<sup>89</sup> The construction of the phrase "undue or unreasonable preference or advantage," as used in the act, when applied to any particular description of traffic, must be the same as when applied to any particular person, company, firm, corporation, or locality. All of said terms being contained in section three of the act, in a single sentence, the same construction must be given to each and every part of the sentence.<sup>90</sup> The use of the word "discrimination" in section one of the Elkins Act, Feb. 19, 1903, as amended by Hepburn Act, June 29, 1906, without the qualifying words "unjust," etc., used in the original act Feb. 4, 1887, §§ 2, 3, was not intended to broaden the provisions of the earlier act in that respect; the word "discrimination" itself, as so applied, implying an unjust or unfair distinction.<sup>91</sup> The provisions of Interstate Commerce Act Feb. 4, 1887, §§ 2, 3, prohibiting unjust discriminations and undue and unreasonable preferences, have reference to the service ren-

87. *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 59 Fed. 400.

88. *Crews v. Richmond, etc., R. Co.*, 1 Int. Com. Rep. 703, 1 Int. Com. C. Rep. 401; *Cowan v. Bond*, 39 Fed. 54.

89. *Interstate Commerce Commission v. Chicago G. W. Ry. Co.*, 141 Fed. 1003, aff'd 209 U. S. 108, 28

Sup. Ct. 493, 52 L. Ed. —; *Union Pac. R. Co. v. Updike Grain Co.*, 178 Fed. 223, 101 C. C. A. 523, aff'd 222 U. S. 215, 32 Sup. Ct. 39, 56 L. Ed. —.

90. *Interstate Commerce Commission v. Chicago G. W. Ry. Co.*, *supra*.

91. *United States v. Wells-Fargo Express Co.*, 161 Fed. 606.

dered, and not to the person of the sender or consignee.<sup>92</sup> The cost of carriage, the risk of injury, and the larger amount which the railway companies are called upon to pay out in damages for losses may excuse a higher freight rate on live stock than on dressed meats and packing house products.<sup>93</sup> A genuine competition which results in a reduction of freight rates negatives any unlawful intent on the part of the carrier, and leaves open only the question as to whether the rates, as established, work an undue preference or discrimination.<sup>94</sup> Under the Interstate Commerce Act Feb. 4, 1887, as amended by the Railroad Rate Act June 29, 1906, § 2, forbidding carriers to give any unreasonable preference or advantage to any shipper or locality, a carrier cannot lawfully make rates so as to overcome the natural advantage of one locality over another, or so as to build up one place at the expense of another.<sup>95</sup> Where a railroad has adopted a system of distribution of cars in violation of the Interstate Commerce Act, leaving out of consideration private cars, the court may leave them out of consideration in an action by a shipper for departure from the system of distribution resulting in discrimination.<sup>96</sup> The Interstate Commerce Act allows differential and discriminating rates so long as they are not unjust or do not operate unfairly, and the essence of the act is that whatever the rate is it shall be the same to all persons similarly situated.<sup>97</sup> A reduction in that part of the through rates on Atlantic seaboard shipments to Missouri river cities which applies to the haul between the Mississippi and Missouri rivers is not beyond the power of the Interstate Commerce Commission, as introducing a new system of rate making

92. *United States v. Wells-Fargo Express Co.*, 161 Fed. 606.

93. *Interstate Commerce Commission v. Chicago G. W. Ry. Co.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. Ed. 705, aff'g judg. 141 Fed. 1003.

94. *Interstate Commerce Commission v. Chicago G. W. Ry. Co.*, *supra*.

95. *State v. Adams Express Co.*, 171 Ind. 138, 85 N. E. 337, rehearing denied 85 N. E. 966.

96. *Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 237 Pa. 420, 85 Atl. 426.

97. *Pittsburgh, etc., R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735.

by artificially apportioning the country into zones tributary to given trade centers, in order to build up or protect certain distributing centers at the expense of others where the commission, by its order, intended only to correct through rates which it found upon complaint were unreasonable in themselves, by substituting therefor reasonable rates.<sup>98</sup> Congress may in prohibiting interstate carriers from issuing free transportation except such persons from the operation of the general prohibition as it may see fit, and the Hepburn Act June 29, 1906, providing that no carrier subject to the provisions of the act shall issue in interstate commerce free transportation, except to railway mail service employes, cannot be construed to prohibit the issuance of a free pass to an employe of the railway mail service for transportation of such employe while not in the actual discharge of his official duties.<sup>99</sup> Express companies are prohibited from giving free transportation of personal packages to their officers and employes and members of their families, and to the officers of other transportation companies, in exchange for passes issued by the latter to officers of the express companies by Elkins Act Feb. 19, 1903, as amended by the Hepburn Act June 29, 1906, which forbids all transportation of property at less than the published rates.<sup>1</sup> The provisions of the Interstate Commerce Act Feb. 4, 1887, §§

98. *Interstate Commerce Commission v. Chicago, etc., R. Co.* 218 U. S. 88, 30 Sup. Ct. 551, 54 L. Ed. —; *Interstate Commerce Commission v. Chicago, etc., R. Co.*, 218 U. S. 113, 30 Sup. Ct. 660, 54 L. Ed. —, rev'g decrees *Chicago, etc., R. Co. v. Interstate Commerce Commission*, 171 Fed. 680.

99. *Schuyler v. Southern Pac. Co.*, 37 Utah, 612, 109 Pac. 1025.

1. *American Express Co. v. United States*, 212 U. S. 522, 29 Sup. Ct. 315, 53 L. Ed. —, also holding that the proviso of the Hepburn Act, fol-

lowing language appertaining solely to the carriage of passengers, that its provisions shall not be construed to prohibit the interchange of passes for the officers, agents and employes of common carriers and their families, or to prohibit any common carrier from carrying passengers free in certain cases, does not embrace free transportation by express companies, although, by the terms of that act, express companies are deemed common carriers. *Affirming decree United States v. Wells-Fargo Express Co.*, 161 Fed. 606.

1, 3, requiring rates for the transportation and for the "receiving, delivering, storage and handling" of property by an interstate carrier to be reasonable, and prohibiting discrimination, are sufficiently broad to cover demurrage charges.<sup>2</sup> Unlawful preferences and discriminations are frequently created by the fixing of freight rates in new classifications whereby one territory is preferred to another.<sup>3</sup> Where defendant railroad company entered into a contract with plaintiff for a term of years to build up, develop, and conduct the business of the transportation of milk on its lines of road; plaintiff was to have full charge of such business, and was to receive as compensation a percentage of the freights earned therein; it was provided that he should charge rates not in excess of those charged by the competitive roads, and should be granted the exclusive privilege of transporting milk over defendant's lines "so far as it was permitted to do so by law;" in the execution of the contract all rates were made by defendant, and plaintiff was not given a monopoly of the milk traffic, such contract was not violative of § 3 of Interstate Commerce Act Feb. 4, 1887, as giving an undue and unreasonable preference.<sup>4</sup> A contract by a railroad company with a shipper to ship his horses to another state on a special through stock train, was not an agreement to perform a special service in violation of Interstate Commerce Act Feb. 4, 1887, every shipper being entitled to the same privilege upon request.<sup>5</sup> In Interstate Commerce Act Feb. 4, 1887, § 2, prohibiting discrimination between shippers under "substantially similar circumstances and conditions," such phrase

2. *Michie v. New York, etc., R. Co.*, 151 Fed. 694, wherein a demurrage or "car service charge" was held not to be discriminative.

3. *Cincinnati, etc., Ry. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 27 Sup. Ct. 648, 51 L. Ed. 995, aff'g decree Interstate Commerce Commission v. Cincinnati, etc., Ry. Co., 156 Fed. 559; *Southern Ry. Co.*

*v. St. Louis Hay & Grain Co.*, 153 Fed. 728, 82 C. C. A. 614, aff'g judg. *St. Louis Hay & Grain Co. v. Southern Ry. Co.*, 149 Fed. 609; *American Tie & Timber Co. v. Kansas City Southern Ry. Co.*, 175 Fed. 28.

4. *Delaware, etc., R. Co. v. Kutter*, 147 Fed. 51, 77 C. C. A. 315.

5. *Kirby v. Chicago & A. R. Co.*, 242 Ill. 418, 90 N. E. 252.

relates to the circumstances and conditions of carriage only, and does not include matters affecting individual shippers; and a railroad may not charge one shipper of coal a lower rate than is charged another shipper between the same terminals, because the former is shipping under contracts extending over a term of years, based on lower rates which were in force when such contracts were made, while the other shipper has no such contracts.<sup>6</sup> The similarity of circumstances and conditions under which a service of carriages is rendered, which, under the Interstate Commerce Act, requires an equality of rate, relates to the circumstances and conditions which affect the service only, and, where different coal mining localities are grouped into a district for rate-making purposes, a carrier is not justified in making a different rate for the same or substantially similar service from a particular locality in such district, or on the product of a particular mine or vein, from that charged others because the difference in the product from such locality, mine or vein and that from other mines in the district is such that it can pay a higher rate and still compete in the market.<sup>7</sup> Under the express provisions of Interstate Commerce Act (Act Feb. 4, 1887, § 3), a common carrier is required not to make or give any undue or unreasonable preference or advantage to any particular firm, person, or corporation, or locality, or to any particular description of traffic, or subject any particular firm, corporation, or locality, or any particular description of traffic, nor to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, but this duty only applies where the circumstances or conditions are substantially similar.<sup>8</sup> A railroad company may establish a station for the special accommodation of a particular customer, and refuse to establish a like station elsewhere for the accommodation of others, and may also

6. *Pennsylvania R. Co. v. Interstate Commerce Commission*, 173 Fed. 1, 174 Fed. 687.  
97 C. C. A. 383.

7. *Philadelphia & R. Ry. Co. v. United States v. Oregon R. & Nav. Co.*, 159 Fed. 975.

grant to one person the right to erect a warehouse or elevator on its right of way, and refuse to grant the same privilege to another, in the exercise of its right to private property.<sup>9</sup>

**§ 13. What constitutes preference or discrimination.**

What is an undue or unreasonable preference or advantage given by a carrier of goods to a shipper within the prohibition of the Interstate Commerce Act Feb. 4, 1887, as amended by the Railroad Rate Act June 29, 1906, is a question of fact.<sup>10</sup> A reduction of freight rates for dressed meats and packing house products from Missouri river points and other points similarly situated to Chicago, which makes such rates lower than those charged for live stock, does not work an undue and unreasonable preference, where the higher rate on live stock has not materially affected any of the markets, prices, or shipments, being reasonably fair to Chicago and the shippers, and the shipments of live stock from the west to Chicago are as great in proportion to the bulk of the business as before the change of rates, and where the lower rate given to the packers was the result of competition, and does not directly influence or injure shippers of live stock.<sup>11</sup> The issuing of franks by an express company to officers, agents, attorneys, or employes of itself or other express companies, or to the families of such persons, upon which property is transported from one state to another free of charge, relates to interstate commerce, which it is within the constitutional power of Congress to regulate, and is within the prohibitions of the Interstate Commerce Act and its amendments against discrimination, undue preference, and departure from the published schedule of rates, and is unlawful. Such gratuitous carriage is not within the exceptions made in Interstate Commerce Act Feb. 4, 1887, § 22, which by their

9. *United States v. Oregon R. & Nav. Co.*, 159 Fed. 975.

10. *State v. Adams Express Co.*, 171 Ind. 138, 85 N. E. 337, rehearing denied 85 N. E. 966.

11. *Interstate Commerce Commission v. Chicago G. W. Ry. Co.*, 209 U. S. 103, 28 Sup. Ct. 493, 52 L. Ed. 705.

terms are restricted to certain classes of passengers carried by railroads and properly carried for certain classes of shippers and for stated purposes.<sup>12</sup> An undue advantage and unlawful discrimination forbidden by Interstate Commerce Act Feb. 4, 1887, § 2, and Act June 29, 1906, § 2, is accorded by a contract between a packing house firm and a stockyard company, by which the company paid a bonus to the packers if they would erect their new plant adjacent to the stockyard instead of in another city as proposed, and operate the plant, and buy only such stock as moved through such stockyards, and pay regular charges on live stock not so bought as if the same had moved to the stockyards.<sup>13</sup> Cartage of sugar from a refinery to the cars is not transportation, nor a service connected with such transportation, within Interstate Commerce Act Feb. 4, 1887, § 15, as amended by Act June 18, 1910, § 12; and hence an allowance therefor in the freight rate constituted an illegal rebate.<sup>14</sup> A reshipping privilege given by railroad companies on grain, grain products, and hay shipped from river points to the southeast at Nashville does not constitute a discrimination as between Nashville and points in Georgia, in violation of Interstate Commerce Act Feb. 4, 1887, § 3.<sup>15</sup> Under Interstate Commerce Act June 29, 1906, § 6, in view of the failure of the tariff filed by a railroad company to provide for stop-over of shipments of syrup, an agreement for such stop-over is invalid because the same service could not be demanded by other persons.<sup>16</sup> An undue and unreasonable preference forbidden by Act Feb. 4, 1887, §§ 3, 6, and Act Feb. 19, 1903, is accorded a shipper by an agreement to expedite a shipment of horses so as to reach a connecting carrier in time to be carried by a special

12. *United States v. Wells-Fargo Express Co.*, 101 Fed. 606. *v. Delaware, etc., Ry. Co.*, 200 Fed. 652.

13. *United States v. Union Stockyard & Transit Co. of Chicago*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. —, modifying judg. (Com. C.) 192 Fed. 330.

14. *American Sugar Refining Co.*

15. *Louisville & N. R. Co. v. United States*, 197 Fed. 58 (U. S. Com. Ct.).

16. *Bergin v. Missouri, etc., Ry. Co.*, (Tex. Civ. App.) 150 S. W. 1184.

fast train; the shipper being charged the regular rates, which make no provision for such special service.<sup>17</sup> An order, readjusting territory and prescribing new rates and differentials, does not constitute real discrimination in so far as it failed to award reparation.<sup>18</sup> A railroad company practices discrimination in respect to transportation, in violation of section 6 of Interstate Commerce Act Feb. 4, 1887, as amended by Act June 29, 1906, § 2, by systematically extending credit for freight charges to one interstate shipper, while exacting and collecting such charges from other shippers under substantially similar circumstances and conditions.<sup>19</sup> Where a carrier receives a shipper's note in payment of freight charges for shipments in interstate commerce, it receives a different compensation from that which the law authorizes, to wit, money, in violation of the Elkins Act as amended by Act June 29, 1906.<sup>20</sup> Discriminations by an interstate carrier of coal between shippers from points grouped together in its schedules, and from which it makes the same rates, are unlawful under Interstate Commerce Act, § 2.<sup>21</sup> That carriers transport coal of other shippers from practically the same territory at the same rates to the same territory and at the same time refuse to carry petitioner's coal shows unjust discrimination.<sup>22</sup> Performance of agreement by a railroad company to give annual passes to persons conveying land to it is forbidden by Interstate Commerce Act June 29, 1906, § 6, subsequently enacted.<sup>23</sup> A carrier cannot refuse the allowance for elevator service on through grain in car loads at terminal points to elevator owners who, through owner-

17. *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, rev'g judg. *Kirby v. Chicago & A. R. Co.*, 242 Ill. 418, 90 N. E. 252.

18. *Fidelity Lumber Co. v. Great Northern Ry. Co.*, 193 Fed. 924, 113 C. C. A. 552.

19. *United States v. Hocking Valley Ry. Co.*, 194 Fed. 234.

20. *United States v. Sunday Creek Co.*, 194 Fed. 252.

21. *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486.

22. *United States v. Louisville & N. R. Co.*, 195 Fed. 88.

23. *Cowley v. Northern Pac. Ry. Co.*, 68 Wash. 558, 123 Pac. 998.



ship of the grain, derive an incidental advantage by using the opportunity afforded during the process of elevation to weigh, store, inspect, clean, mix, or otherwise treat the grain, in view of the provisions of Act June 29, 1906, recognizing that services in transportation, rendered by an owner of the property transported, are to be paid for by the carrier.<sup>24</sup> Nor can the Interstate Commerce Commission make the allowance by a carrier to the owner of an elevator of the cost of the elevation in transit of grain in which he has an interest, conditional upon his failure to use the opportunity afforded during the process of elevation to treat, weigh, inspect, or mix the grain, since such allowance cannot be deemed an undue preference or discrimination forbidden by the Act to Regulate Commerce, in view of the provisions of Amendatory Act June 29, 1906, recognizing that services in transportation, rendered by an owner of the property transported, are to be paid for by the carrier.<sup>25</sup> A carrier may not, under Interstate Commerce Act Feb. 4, 1887, make the ownership of goods tendered to it for carriage the criterion by which its charge for such car-

24. *Union Pac. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 32 Sup. Ct. 39, 56 L. Ed. —, *aff'd* judg. *Union Pac. R. Co. v. Updike Grain Co.*, 178 Fed. 223, 101 C. C. A. 583.

A carrier cannot enforce a rule making its allowance for elevator service on through grain in car loads at terminal points conditional upon the return of the empty car to the carrier within 48 hours after delivery to the elevator, so as to defeat the right to compensation for elevator service rendered at elevators located on the lines of other railroads, where the return of the cars to the carrier was made impossible by the rules of a railway association of which the carrier was a member, and over which the elevator owners had

no control, no such possibility existing if the elevator was one of those located along the carrier's tracks. *Id.*

A carrier may make its allowance for elevator service on through grain in car loads at terminal points at elevators located on the lines of other carriers, as well as those located along its own tracks, conditional upon the return of the empty car to the carrier within 48 hours after delivery to the elevator, where such car can be unloaded and returned in a much shorter time. *Id.*

25. *Inter-state Commerce Commission v. Diffenbaugh*, 22 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. —, modifying decree *F. H. Peavey & Co. v. Union Pac. R. Co.*, 176 Fed. 409.

riage is to be measured. The ownership or nonownership by the shipper of the goods tendered for carriage is not a dissimilar circumstance and condition, within the meaning of § 2 of the act, prohibiting inequality and discrimination in rates.<sup>26</sup> A forwarding agent is a person within the meaning of § 2 of the act, forbidding preferences and discriminations in rates. A carrier may not forbid the aggregation of the shipments of various owners for the purpose of car load rating in official classification territory, or the combination of such shipments by forwarding agents for that purpose, where preferences and discriminations forbidden by § 2 of the act will result from the carrier's action.<sup>27</sup> A lease to a shipper of one of the piers and improvements thereon belonging to a terminal company, which relieves him from the payment of all wharfage and storage charges other than as the same may be included in the yearly rental, and has enabled him to acquire practically a monopoly of the export cotton-seed products, constitutes an unlawful or undue preference under the Act to Regulate Commerce, where other shippers are not and cannot be afforded the same facilities on the same conditions.<sup>28</sup> Where a lumber company which was a shipper of railroad ties, made a contract with a railroad company by which it agreed to build a hoist for loading ties at a station, and the railroad company agreed to haul its ties to a designated point at \$8.50 per car, and to return to the lumber company ten per cent. on the cost of the hoist until entirely paid for, when it was to become the property of the railroad company, but in the meantime it could be used only by the lumber company, and the rate given was materially less than

26. *Interstate Commerce Commission v. Delaware, etc., R. Co.*, 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. —, rev'g decree Delaware, etc., R. Co. v. Interstate Commerce Commission, 166 Fed. 499.

27. *Interstate Commerce Commission v. Delaware, etc., R. Co.*, 220 U.

S. 235, 31 Sup. Ct. 392, 55 L. Ed. —, rev'g decree Delaware, etc., R. Co. v. Interstate Commerce Commission, 166 Fed. 499.

28. *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. —.

the published rate, which was charged other shippers, such contract was one designed to give the lumber company an undue preference or advantage over other shippers, in violation of Interstate Commerce Act Feb. 4, 1887, § 3, and was illegal and not enforceable in any part.<sup>29</sup>

A contract which gives a shipper the right to remove the goods after their arrival at his convenience is violative of Interstate Commerce Act, §§ 3, 6, and Elkins Act, as creating an unreasonable preference.<sup>30</sup> An arrangement between a railway company and a construction company for reduced-rate transportation for men and materials required by the company in grading an extension, when entered into in good faith, is not obnoxious to the provisions of laws prohibiting departures from published tariffs.<sup>31</sup> Where an interstate carrier had not provided a special rate for expedited shipments of cattle to market, an oral agreement to expedite a shipment transported under regular rates was void as discriminatory in violation of the Elkins Act.<sup>32</sup> A contract by which an interstate railroad company agreed to pay an elevator company \$1.75 per car for grain originating on its line and passing through the elevator, not allowed to all elevators, nor covered by a filed and published rate schedule, was void.<sup>33</sup> Under Interstate Commerce Act, Feb. 4, 1887, as amended by the Elkins Act, Feb. 19, 1903, a contract by a carrier of live stock to furnish a special train for a 10 car load shipment at regular train rates is invalid as constituting discrimination.<sup>34</sup>

29. *Chesapeake & O. Ry. Co. v. Standard Lumber Co.*, 174 Fed. 107, 98 C. C. A. 81.

30. *Central of Ga. Ry. Co. v. Patterson* (Ala. App.). 60 So. 465.

A privilege granted to a shipper by a carrier to prevent freight being carried over a competing line is unjustifiable, and will not relieve the carrier from being amenable to the Interstate Commerce Act. *Id.*

31. *Santa Fe, etc., R. Co. v. Grant Bros. Const. Co.*, 228 U. S. 177, 33 Sup. Ct. 474.

32. *Clegg v. St. Louis & S. F. R. Co.*, 203 Fed. 971.

33. *Elwood Grain Co. v. St. Joseph & G. I. Ry. Co.*, 202 Fed. 845.

34. *Siemonsma v. Chicago, etc., Ry. Co.* (Iowa), 139 N. W. 1077.

### § 14. Justification or defense.

An arrangement between an interstate railroad company and coal shippers in a certain field fixing a basis which should be considered equitable for the distribution of cars between such shippers, does not operate to relieve the railroad company from the obligations imposed on it by section 3 of the Interstate Commerce Act Feb. 4, 1887, to treat shippers without discrimination.<sup>35</sup> In an action by a shipper against a railroad for the cost of constructing grain doors for box cars used in transporting grain from one State to another, an answer that the Interstate Commerce Commission had made a rule that a carrier could not reimburse shippers for the expenses incurred in attaching grain doors, unless expressly so provided in its tariff, failed to state a defense.<sup>36</sup> Differences as to competition between coal intended for railroad consumption and other coal, depending on difference in facilities possessed by the different parties, do not make interstate commerce therein dissimilar within Interstate Commerce Act Feb. 4, 1887, § 2, so as to justify the giving of a lower rate for transportation of railway coal.<sup>37</sup> The provision of section 15 of the Interstate Commerce Act as amended by Act June 29, 1906, § 4, permitting a just and reasonable allowance by a carrier for services rendered or instrumentalities furnished in connection with the transportation, is not available as a defense to a carrier in an action to recover for discriminations practiced by the making of a secret allowance to a favored shipper.<sup>38</sup> A claim against a carrier for rebates may be resisted as against public policy or contrary to State or Federal regulations, notwithstanding any agreement of

35. *United States v. Norfolk & W. Ry. Co.*, 143 Fed. 266, 74 C. C. A. 404, rev'g judg. 138 Fed. 849.

36. *Hanks v. Missouri Pac. Ry. Co.*, 92 Neb. 594, 138 N. W. 750, and there being no allegation as to when a rule relied upon by defendant was adopted by the Interstate Commerce Commission, it will not be presumed to have

been adopted before the grain doors were furnished.

37. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 225 U. S. 326, 32 Sup. Ct. 742, 56 L. Ed. 1107

38. *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486.

the parties.<sup>39</sup> Where an interstate shipment was made under a contract, providing that if the stock shipped was injured the shipper should obtain no compensation beyond an agreed valuation, a decision that the agreement as to valuation was invalid does not give the shipper a rebate, but only compensation for loss suffered, which is not a lower rate than he is entitled to.<sup>40</sup>

Interstate Commerce Act Feb. 4, 1887, § 3, which prohibits discriminations, and section 1 as amended by Act June 29, 1906, which requires carriers to furnish transportation on reasonable requests therefor, make it the duty of an interstate carrier to furnish equal facilities for transportation, as well as equal rates, to all shippers who are similarly situated; and it cannot evade such duty in the distribution of cars by claiming that it is not the owner of a portion of the cars carried over its lines.<sup>41</sup> An interstate carrier, in the distribution of cars, cannot give a shipper a preference in order that it may profit thereby, or that the shipper may profit thereby; and when called upon by a shipper for full car service the only defense which the carrier can interpose, in case of failure to comply with the demand, is that the supply which it has furnished is sufficient for normal demands, or that in case of shortage it has fairly and impartially prorated all of its car equipment.<sup>42</sup> Under the Interstate Commerce Act June 29, 1906, § 2, prohibiting a carrier from extending to any shipper facilities in transportation, except such as are specified in the tariff, a shipper cannot, under a special contract with a carrier, claim special facilities in transportation, such as that the freight be transferred in a single, covered express wagon by itself, so that, in an action by a shipper based on such special contract, the ex-

39. *First Trust & Savings Bank v. Southern Indiana Ry. Co.*, 195 Fed. 330.

40. *Cramer v. Chicago, etc., R. Co.*, 153 Iowa, 103, 133 N. W. 387.

41. *United States v. Baltimore &*

*O. R. Co.*, 165 Fed. 113. See also *United States v. Baltimore & O. R. Co.*, 154 Fed. 108.

42. *United States v. Baltimore & O. R. Co.*, *supra*.

press company could show as a defense that the tariff rates applicable did not provide for such special privileges.<sup>43</sup>

An interstate carrier can charge no more and no less than the rate filed with and approved by the Interstate Commerce Commission and published as the lawful rate, and a greater or less charge cannot be justified on the ground of mistake.<sup>44</sup> In an action by a shipper against a railroad company to recover damages for breach of contract, a plea was sufficient, in connection with the contract set out in plaintiff's declaration, to raise the defense that the contract was illegal, as giving plaintiff lower rates on interstate shipments than those fixed by the schedules filed and published by defendant as required by Interstate Commerce Act, Feb. 4, 1887, § 6, as amended by Act March 2, 1889, § 1.<sup>45</sup>

### § 15. Preference and discrimination by giving rebates.

Under Elkins Act Feb. 19, 1903, § 1, prohibiting the giving or receiving of rebates in respect to the transportation of any property in interstate or foreign commerce "by any device whatever" it was unlawful for a corporation organized to control the interstate transportation of a brewing company to demand and receive as a consideration for the routing of a brewing company's products over certain lines of railroad a concession equal to one-eighth or one-tenth of the published freight rates; a refrigerator company organized for that purpose, having entered into a contract for rebates with certain railroads, was a "party interested in the traffic," and was therefore subject to the provisions of such

43. *Winn v. American Express Co.*, 149 Iowa, 259, 128 N. W. 663.

44. *Aldrich v. Southern Ry. Co.* (S. C.), 79 S. E. 316.

45. *E. E. Teanzer & Co. v. Chicago, etc., Ry. Co.*, 191 Fed. 543.

An agreement by an interstate railroad carrier to accept less than its established and published rate by

dividing the same with a shipper which built a private track over its own land connected with the railroad company's line violates Interstate Commerce Act Feb. 4, 1887, § 6, as amended by Act March 2, 1889, § 1, and is wholly illegal and unenforceable. *Id.*

act.<sup>46</sup> The meaning of the clause, "by any device whatever" in said act is directly or indirectly in any way whatever.<sup>47</sup> A rebate or concession from a part of a single rate whereby property is transported thereunder at a less rate than the established rate is a concession from the entire rate, and renders all transportation thereunder illegal.<sup>48</sup> The word "rate," as used in said act, means the net amount the carrier receives from the shipper and retains, and any device by which such amount is reduced below the rate given in the published schedule is one for the giving of a rebate.<sup>49</sup> Where the published tariff schedules of defendant, an interstate carrier by rail, gave its rate on packing house products from Kansas City, Kan., including the rate charged by a belt line company for carriage between Kansas City, Kan., and Kansas City, Mo., to a connection with defendant's road, and defendant charged and received such rate from a packing company, paid the charge of the belt line company, and afterwards paid back to the packing company the sum of one dollar upon each car so shipped, such repayment constituted the granting of a rebate, in violation of said act, and could not be justified as lawful on the ground that it was an allowance to the packing company for the use of its own private track in moving the cars from its shipping building to a connection with the belt line tracks.<sup>50</sup> The purpose of Congress in the enactment of the act, known as the "Elkins Law," was to secure uniform freight rates to all shippers, and its provisions are violated by the giving or receiving of any rebate or concession whereby any property shall be transported at a less rate by an

46. *United States v. Milwaukee Refrigerator Transit Co.*, 145 Fed. 1007, also holding that the brewing company, which paid its freights in full and received no rebates, and was not a party to the contracts between the refrigerator company and the railroad companies under which the rebates were received, was not shown

to have received rebates in violation of the act.

47. *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135.

48. *Armour Packing Co. v. United States*, *supra*.

49. *United States v. Chicago & A. Ry. Co.*, 148 Fed. 646.

50. *United States v. Chicago & A. Ry. Co.*, *supra*.

interstate carrier than that named in the tariffs published and filed by such carrier, whether by direct agreement between the shipper and carrier or indirectly by "any device whatever;" and where a railroad company has published and filed a schedule of rates on interstate shipments to points beyond its own line said section applies to such rates equally with those between points on its own road.<sup>51</sup> Private tracks built by the owner of a packing plant on its own property, extending from a connection with the tracks of a belt line railroad company to and around its buildings, and used in loading cars for shipment, are not a part of the railroad system, but plant facilities, and the refunding by a railroad company, which made and published a schedule of through rates, including the belt line charge, of one dollar per car to such packing company on shipments made by it and paid for at the schedule rate, on the ground that it was a payment for the use of such private tracks, constituted the giving of a rebate, in violation of section 1 of the Elkins Act.<sup>52</sup> Where an interstate carrier returned to a shipper of grain after payment of the freight an amount equal to elevator charges at the point of shipment, and the carrier had not published or filed any schedule showing that it had absorbed such elevator charge as a part of its rate between the points in question, the carrier was guilty of granting rebates prohibited by Elkins Act, section 1.<sup>53</sup> Where defendant operated a line of railroad from Montpelier to Wells River, in Vermont, a distance of thirty-nine miles, and by a joint tariff, to which it

51. *United States v. Standard Oil Co.*, 148 Fed. 719, also holding that a consignee, no less than the consignor, is chargeable with a violation of § 1 of the law, by receiving rebates or concessions from the published tariffs of an interstate carrier through the cancellation of terminal charges at the point of destination which form a part of the tariffs as so published.

52. *Chicago & A. R. Co. v. United States*, 212 U. S. 563, 29 Sup. Ct. 689, 53 L. Ed. 653, aff'g judg. *Chicago & A. R. Co. v. United States*, 156 Fed. 558, 84 C. C. A. 324, which affirmed *United States v. Chicago & A. R. Co.*, 148 Fed. 646.

53. *Wisconsin Cent. Ry. Co., v. United States*, 169 Fed. 76, 94 C. C. A. 444.



was a party, the rate on coal from a point in Pennsylvania to Montpelier was fixed at \$3.55 per ton, and to all other points on its line at \$3.80, of which it received 75 cents as its share, and the published rules also provided that, where the point of destination of a shipment was between any two points named in the schedules, the rate should be the same as to the next more distant point named, the tariff rate to Montpelier should be construed as applying to the station in that city, and where defendant received coal for its own use, which it received at such station and hauled over its own line to a chute between that and the next station, although within the limits of the city, the fact that it had the coal billed at the \$3.80 rate and took its divisional share thereof did not render it subject to prosecution for receiving a rebate, in violation of Interstate Commerce Act Feb. 4, 1887, as amended by Act Feb. 19, 1903.<sup>54</sup> A shipment from New York City to Buffalo, by way of New Jersey and Pennsylvania, is interstate commerce, and so is subject to the provisions of the Elkins law, as to rebates; the Interstate Commerce Act Feb. 4, 1887, § 1, though providing that the provisions of the act shall apply to any carrier engaged in the transportation of passengers or property from one State to any other State, having a proviso that the provisions of this act shall not apply to the transportation of property "wholly" within one State.<sup>55</sup> A shipper is not entitled to recover damages from a railroad company for discrimination in rates because of rebates paid to a shipper from another district; the rate from such district with the rebates deducted being higher than that paid by plaintiff.<sup>56</sup>

The payment by railroad companies of lighterage charges on the product of a sugar refinery in Brooklyn, which was delivered at one of their regular public terminal stations, did not constitute the

54. *Montpelier, etc., R. v. United States*, 187 Fed. 271, 109 C. C. A. 532.

55. *United States v. Delaware, etc., R. Co.*, 152 Fed. 269.

56. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 181 Fed. 403; dismissed for want of jurisdiction 183 Fed. 908.

giving of a rebate, in violation of Interstate Commerce Act, Feb. 4, 1887, § 2, nor an undue discrimination within § 3, against another company whose plant was outside of the lighterage limits.<sup>57</sup> A contract by which a railroad company leased premises to a shipper for less than their rental value, as a means of granting to the lessee a rebate or concession from its published rates, was invalid, under Interstate Commerce Act, § 3, and Elkins Act, § 1, and also under 1 Gen. Code Ohio, § 505, *et seq.*<sup>58</sup> A suit by a railroad shipper for loss of goods, on a policy of insurance issued to the carrier, after receipt of the limited value fixed on such goods by the carrier's schedules and bills of lading, is in violation of section 6 of the Interstate Commerce Act, as amended by Act June 29, 1906, § 2, as soliciting a rebate or concession, and not maintainable.<sup>59</sup> The word "rebate," as used in the Interstate Commerce Act and its amendments, refers only to such a discount, deduction, or drawback as creates a discrimination in favor of a particular shipper and against other shippers in like situation.<sup>60</sup>

#### § 16. Discrimination in car distribution.

Under Interstate Commerce Act Feb. 4, 1887, § 1, as amended by Act June 29, 1906, § 1, which requires railroad companies to furnish cars to shippers on collateral branch lines "without discrimination in favor of or against any shipper," shippers on the main line of a road and those on a collateral branch line are entitled to precisely the same treatment in the distribution of cars.<sup>61</sup>

57. *Baltimore & O. R. Co. v. United States*, 200 Fed. 779.

58. *Cleveland, etc., Ry. Co. v. Hirsch*, 204 Fed. 849.

59. *Duplan Silk Co. v. American & Foreign Marine Ins. Co.*, 205 Fed. 724.

60. *American Sugar Refining Co. v. Delaware, etc., R. Co.*, 207 Fed. 733.

An allowance of two cents per hun-

dred pounds made to all shippers of sugar in car load lots from the seaboard to certain terminal points "for transfer" by the rate schedule filed and published by a railroad company is not a rebate nor a discrimination within the meaning of Interstate Commerce Act, §§ 2 and 3. *Id.*

61. *United States v. Baltimore & O. R. Co.*, 165 Fed. 113; *Baltimore*

In the distribution of cars by a railroad company between operators of coal mines on its line in times of shortage, the percentage of cars to which each mine is entitled should be determined solely by the physical capacity of the mine to furnish coal for shipment; and a rule of distribution by which such capacity is taken as one, while the amount of shipments for the preceding two years is taken as two, the sum of the rated capacity and such shipments being divided by three to determine the basis of distribution, is unfair and inequitable to new mines, and results in giving an undue preference or advantage to old mines, in violation of the interstate commerce law.<sup>62</sup> A rule of a railroad company under which any coal mine operator on its line using its terminal tracks at the sea coast and there unloading its cars within five days on an average during any month is given as a premium a fifty per cent. larger allotment of cars during the next month is an attempted evasion of the provisions of the Interstate Commerce Act requiring a fair and impartial distribution of cars between shippers, and gives an undue preference or advantage to shippers so favored, in violation of such act.<sup>63</sup> In the distribution of cars by an interstate railroad company between the operators of coal mines on its line, its own fuel cars, the fuel cars of other roads sent upon its line to be loaded, its regular equipment of cars, and the private or individual cars of any mine operator should be placed absolutely on the same basis as together forming the available car equipment of the road as a whole; and where its own fuel cars or those of other roads are consigned to a particular mine, or the operator's own private cars are delivered to it, they should be charged against such mine, and it should be allotted only so many of the system cars as are necessary to make up its pro rata share of the whole.<sup>64</sup>

& O. R. Co. v. United States, 165 Fed. 113. See also United States v. Baltimore & O. R. Co., 154 Fed. 108.

62. United States v. Baltimore & O. R. Co., 165 Fed. 113. See also

United States v. Baltimore & O. R. Co., 154 Fed. 108.

63. United States v. Baltimore & O. R. Co., *supra*.

64. United States v. Baltimore & O. R. Co., *supra*.

In the distribution of cars by an interstate railroad company between coal mining companies on its line, when the supply is insufficient to meet all demands, a mining company which owns cars individually is entitled to have such cars assigned to its use; but it is not entitled in addition to a pro rata share of the cars owned by the railroad company, and such a distribution, if made, resulting in giving to such company larger facilities for transporting its product than are given to other companies similarly situated, but which own no private cars, constitutes the giving of an undue preference or advantage to such company, in violation of the interstate commerce law.<sup>65</sup> A railroad company engaged in interstate commerce in making distribution of cars between coal mining companies engaged in such commerce where there is a shortage has no legal right under Interstate Commerce Act Feb. 4, 1887, § 3, to leave out of consideration private or foreign cars used by such a company, although only in intrastate commerce, and make the allotment with reference to its own cars alone by which such company is given a preference or advantage over its competitors in interstate commerce.<sup>66</sup> It is a charter duty of railroads to provide cars, as well as tracks and locomotives, and in the distribution of cars by an interstate railroad company among coal mines on a percentage basis in times of shortage of cars, private cars owned by shippers or consignees, which have no right upon the company's tracks except by virtue of its charter, must be considered as leased to it and forming a part of its commercial equipment, and while the owner is entitled to the exclusive use of such cars, they are to be counted against the mine as a part of its percentage in the distribution, and this even though the particular owner does only an intrastate business; the carrier having no right under the Interstate Commerce Law to discriminate in favor of local commerce, as against interstate or foreign commerce. The same rule also applies to fuel cars of foreign rail-

65. *United States v. Baltimore & O. R. Co.*, *supra*.

66. *Majestic Coal & Coke Co. v. Illinois Cent. R. Co.*, 162 Fed. 810.

road companies, sent to the mines to be loaded with coal and transported to their lines for their own use; the fact that they are also common carriers making no distinction between them and other consignees. But the cars of the distributing carrier used for its own fuel supply which are loaded and delivered to it at the mine tipple, are not engaged in transporting a commodity in commerce, but in the operating service of the company, and are not to be counted in the distribution of cars as a part of its commercial equipment, although they are to be counted in reduction of the percentage to which the mine loading them is entitled which is not based on its output as a producer of coal, but as a shipper, and should be fixed by the quantity it offers for transportation in commerce.<sup>67</sup> Under the Pennsylvania Constitution, Interstate Commerce Act Feb. 4, 1887, prohibiting discrimination by carriers either in rates or transportation facilities, and the Pennsylvania statute, requiring railroads to transport cars owned by individual shippers on reasonable rules and regulations, a rule providing that, in the distribution of cars of a railroad company available for the transportation of coal, cars for the railroad's fuel supply, foreign railroad cars, specially consigned for the fuel supply of the consigning railroads, and individual cars owned by shippers and assigned to specified mines for loading, should be charged against the capacity of the mines at which they were placed, and that the difference between the rated capacity of the mine and the capacity of such assigned cars should be the rate on which all the other cars of the railroad company would be prorated, which rule operated slightly to the advantage of the owners of individual cars, was not objectionable as a discrimination against them.<sup>68</sup> Where a railroad, having permitted the erection of grain warehouses along its right of way in which grain

67. *Chicago & A. R. Co. v. Interstate Commerce Commission*, 173 Fed. 930, decree reversed *Interstate Commerce Commission v. Illinois*

*Cent. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155.

68. *Logan Coal Co. v. Pennsylvania R. Co.*, 154 Fed. 497.

was stored for producers and owners for hire as well as grain purchased and owned by the warehousemen, promulgated a rule requiring all orders for cars for the shipment of grain from such warehouses to be made by the warehousemen, and the rule operated to the prejudice of private storers of grain through the use of cars ordered by the warehousemen for the shipment of their own grain before cars could be obtained for the shipment of grain in the warehouse owned by storers, and by the appropriation of cars intended for storers by the warehousemen, the railroad company, under its duty to see that no discrimination was practiced, was bound either to change the rule, or to see that it was not permitted to operate in favor of one shipper and against another.<sup>69</sup>

**§ 17. No discrimination by demand of prepayment of charges.**

An interstate carrier does not subject a consignee to an undue or unreasonable prejudice or disadvantage under section three of the Interstate Commerce Act by exacting, after due notice, the prepayment of charges for transportation of all property consigned to it, while it does not require such charges to be paid in advance upon freight consigned to others similarly situated.<sup>70</sup> The act does not prohibit the giving of all preferences and advantages, or the production of all prejudices and disadvantages, but only those that are undue and unreasonable.<sup>71</sup> A common carrier has the right under the common law to demand the prepayment of charges for freight of one, and to give credit for them to another similarly situated, and an interstate common carrier is free to exercise all its rights under the common law to the full extent to which such exercise has not been made unlawful by the Interstate Commerce Act.<sup>72</sup> The fact that a carrier, for the purpose of injur-

69. *United States v. Oregon R. & Nav. Co.*, 159 Fed. 975.

70. *Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co.*, 168 Fed. 161.

71. *Atchison, etc., R. Co. v. Den-*

*ver, etc., R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291.

72. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699; *Southern Indiana Express Co.*

ing the business of a consignee, or harassing it, subjects it to a prejudice or disadvantage which is neither undue nor unreasonable, does not change the nature of the prejudice or disadvantage or create any cause of action therefor.<sup>73</sup>

### § 18. Equal facilities for interchange of traffic.

The second clause of section three of said act requires carriers subject to the provisions of the act to afford, according to their respective powers, all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such connecting lines.<sup>74</sup> In the absence of statutory provision, the interchange of traffic between two connecting railroads is a matter for contract between them, and the courts have no power to compel such interchange, or to fix the terms on which it shall be made. Nor is such power conferred upon the courts by the Interstate Commerce Act.<sup>75</sup> The duty imposed by this clause to afford equal facilities to all connecting carriers only requires that facilities which are reasonable and proper be furnished, and only requires this where the circumstances and conditions are substantially similar and not where they are dissimilar, and such facilities are not required to be furnished without reference to its own interest.<sup>76</sup> A connecting

v. United States Express Co., 88 Fed. 659.

73. Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co., *supra*.

74. Texas, etc., R. Co. v. Interstate Commerce Co., 162 U. S. 197; Interstate Commerce Com. v. Brimson, 154 U. S. 447; New York, etc., R. Co. v. New York, etc., R. Co., 50 Fed. 867; Cutting v. Florida R., etc., Co., 30 Fed. 663; Seofield v. Lake Shore, etc., R. Co., 2 Int. Com. C.

Rep. 116; United States v. Delaware, etc., R. Co., 40 Fed. 101.

75. Central Stock Yards Co. v. Louisville & N. R. Co., 118 Fed. 113.

76. Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed 158, and the burden of proof is on the carrier alleging discrimination; Little Rock, etc., R. Co. v. St. Louis Southwestern R. Co., 63 Fed. 775; Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 667; Little Rock,

road with through facilities may be preferred to one with only local facilities, and the right to equal facilities is reciprocal.<sup>77</sup> The statutory right to demand equal facilities is only at terminal points,<sup>78</sup> and a connecting railway desirous of an interchange of passengers and freight cannot demand as a matter of right an interchange at the point of physical connection without first furnishing at such point reasonable and proper facilities for the interchange sought, and cannot rely upon the terminal facilities at another point.<sup>79</sup> The right to sell through tickets and check through baggage arises out of contract and one company is not required by the statute to sell through tickets over another road,<sup>80</sup> nor is there any obligation on the part of either to honor tickets issued by the other.<sup>81</sup> The use of the tracks and terminal facilities of one carrier by another is not granted by the statute, and no common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other in the same manner and to the same extent a third carrier is.<sup>82</sup> In the absence of statutory provisions, the rights of a railroad com-

etc.. *R. Co. v. St. Louis, etc.*, R. Co., 59 Fed. 403; *Kentucky, etc., Bridge Co. v. Louisville, etc.*, R. Co., 37 Fed. 624; *Augusta Southern R. Co. v. Wrightsville, etc.*, R. Co., 74 Fed. 522; *New York, etc., R. Co. v. New York, etc.*, R. Co., 50 Fed. 867, 3 Int. Com. Rep. 542, 4 Int. Com. C. Rep. 702.

77. *Little Rock, etc., R. Co. v. East Tennessee, etc.*, R. Co., 47 Fed. 771.

78. *United States v. Deladare, etc.*, R. Co., 40 Fed. 101; but see *New York, etc., R. Co. v. New York, etc.*, R. Co., 4 Int. Com. C. Rep. 702.

79. *Little Rock, etc., R. Co. v. St. Louis, etc.*, R. Co., 59 Fed. 403.

The term "facilities" does not embrace car equipment for the transportation of freight over the carrier's

own road. *United States v. Delaware, etc.*, R. Co., 40 Fed. 101.

80. *Chicago, etc., R. Co. v. Pennsylvania Co.*, 1 Int. Com. Rep. 357, 1 Int. Com. C. Rep. 86.

81. *Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co.*, 61 Fed. 158.

82. *Little Rock, etc., R. Co. v. St. Louis, etc.*, R. Co., 59 Fed. 402, 63 Fed. 775; *Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co.*, 51 Fed. 475, 61 Fed. 158; *St. Louis Drayage Co. v. Louisville, etc.*, R. Co., 65 Fed. 39; *Kentucky, etc., Bridge Co. v. Louisville, etc.*, R. Co., 37 Fed. 571; *Chicago, etc., R. Co. v. Pennsylvania, etc.*, R. Co., 1 Int. Com. Rep. 86.



pany, under a lawful agreement for a specified use of the tracks of another railroad company, are measured, in respect to the tracks used, by the terms of the contract.<sup>83</sup> A railroad company cannot appropriate the grievance of a traffic or locality, under the clause prohibiting preference by a carrier to persons, firms or corporations, and to localities and traffic, and complain on account of it.<sup>84</sup> No authority to issue through tickets or through bills of lading for property, at through rates over connecting lines, is conferred by the Interstate Commerce Act, upon common carriers of interstate commerce, in the absence of voluntary arrangements between the companies, and the courts have no power or authority under the statute or the common law to provide for through routing and through rating.<sup>85</sup> Other connecting carriers are not entitled to through billing and rating, and to the use of the tracks and terminals of a carrier which has voluntarily made an arrangement giving these advantages to one connecting carrier, and a refusal to grant such facilities is not an unlawful discrimination.<sup>86</sup> One or more individual railroad companies are not forbidden by either the common law or the Interstate Commerce Act to select as to which one of two or more corporations they will employ as auxiliary to their own line, as the agency by which they will send freight beyond such lines, or as their agent to receive freight on the auxiliary line to be transmitted to their own line upon through bills and without breaking bulk.<sup>87</sup> The obligation to furnish equal

83. *Alford v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 771, 3 Int. Com. C. Rep. 519.

84. *Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co.*, 61 Fed. 158.

85. *Little Rock v. East Tennessee, etc., R. Co.*, 3 Int. Com. C. Rep. 1; *Interstate Commerce Com. v. Western, etc., R. Co.*, 93 Fed. 83; *St. Louis Drayage Co. v. Louisville, etc., R. Co.*, 65 Fed. 41; *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 63 Fed. 778, 59 Fed. 405, 41 Fed. 559; *Capehart v. Louisville, etc., R. Co.*, 3 Int. Com.

Rep. 278; *Cincinnati, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 184.

86. *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 63 Fed. 775, 59 Fed. 400; *Gulf, etc., R. Co. v. Miami Steamship Co.*, 86 Fed. 407; *Chicago, etc., R. Co. v. Pennsylvania R. Co.*, 1 Int. Com. C. Rep. 86; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. 567.

87. *Prescott, etc., R. Co. v. Atchison, etc., R. Co.*, 73 Fed. 438; *St. Louis Drayage Co. v. Louisville, etc.,*

facilities without discrimination does not require a common carrier to advance money to all other carriers on the same terms, or to give credit for the carriage of articles of trade and commerce to all carriers, because it extends credit for such services to some others.<sup>88</sup> The refusal by a railroad company to transport freight on foreign cars, when its own cars are not in use but are free to be employed in the transportation desired, or where a transfer of freight will not be injurious to it, is not a denial of reasonable and proper facilities.<sup>89</sup> The Interstate Commerce Commission has no power to compel a carrier to furnish any particular equipment of cars, or any cars at all,<sup>90</sup> or to compel it to receive and run the cars of a private company over its line or contract for the use thereof,<sup>91</sup> and the fact that carriers interchange cars with one another upon certain terms, does not entitle a private stock yard company which is not a "connecting line" to equal facilities for the interchange of traffic.<sup>92</sup> The refusal of a State court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon does not contravene the various provisions of the Interstate Commerce law making it obligatory to provide proper facilities for interstate carriage of freight, and preventing carriers from obstructing continuous shipments on interstate lines.<sup>93</sup>

R. Co., 65 Fed. 39; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 41 Fed. 563. But see New York, etc., R. Co. v. New York, etc., R. Co., 50 Fed. 867.

88. Southern Indiana Express Co. v. United States Express Co., 88 Fed. 659; Gulf, etc., R. Co. v. Miami Steamship Co., 86 Fed. 407; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 63 Fed. 775, 59 Fed. 400; Matter of Application of Clark, 2 Int. Com. Rep. 797, 3 Int. Com. C. Rep. 649.

89. Oregon Short Line, etc., R. Co.

v. Northern Pac. R. Co., 61 Fed. 158, 51 Fed. 465.

90. Rice v. Cincinnati, etc., R. Co., 3 Int. Com. Rep. 841, 5 Int. Com. C. Rep. 193; Scofield v. Lake Shore, etc., R. Co., 2 Int. Com. Rep. 67, 2 Int. Com. C. Rep. 90.

91. Worcester Excursion Car Co. v. Pennsylvania R. Co., 2 Int. Com. Rep. 792, 3 Int. Com. C. Rep. 577.

92. Burton Stock Car Co. v. Chicago, etc., R. Co., 1 Int. Com. Rep. 329.

93. Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 S. Ct. 132, 48 L. Ed. 268.

The provision of Interstate Commerce Act, § 3, that the requirement that all railroads shall provide reasonable facilities for the interchange of traffic shall not require one carrier to give the use of its track or terminal facilities to another engaged in like commerce, is not a substantive enactment, but a mere interpretation clause designed to restrain, if necessary, the generality of the language preceding it.<sup>94</sup> Prior to the passage of the Hepburn Act, June 29, 1906, connecting railroads were free to adopt or refuse to adopt joint through tariff rates, and this freedom was not abridged, as between the Union Pacific Railroad Company and the Central Pacific Railroad Company, by either section 12 of Act July 1, 1862, c. 120, 12 Stat. 495, requiring roads of such companies to be operated as one continuous line, so far as the public or the government are concerned, or section 15 of Act July 2, 1864, c. 216, 13 Stat. 362, which require them to afford and secure to each equal advantages and facilities as to rates, time, and transportation without discrimination.<sup>95</sup>

### § 19. Charges for long and short hauls.

Section four of the Interstate Commerce Act Feb. 4, 1887, provided that it shall be unlawful for any common carrier subject to the provisions of the act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.<sup>96</sup> Charging a greater sum for a shorter than for a

94. *Pittsburgh, etc., Ry. Co. v. Hunt*. — *Ind.* —, 86 N. E. 328.

95. *United States v. Union Pac. R. Co.*, 188 Fed. 102.

96. *Merchants' Union v. Northern Pac. R. Co.*, 4 Int. Com. Rep. 183. 5 Int. Com. C. Rep. 478; *Lehmann v. Texas, etc., R. Co.*, 3 Int. Com. Rep. 706, 5 Int. Com. C. Rep. 44; *North-*

*western Iowa Grain, etc., Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 431, 2 Int. Com. C. Rep. 604; *Martin v. Southern Pac. R. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; *Thatcher v. Delaware, etc., Canal Co.*, 1 Int. Com. Rep. 356, 1 Int. Com. C. Rep. 152; *Osborne v. Chicago, etc., R. Co.*, 48 Fed. 49.

longer haul may also constitute a violation of sections one, two and three.<sup>97</sup> The third section supplies the principle on which rests the fourth section.<sup>98</sup> Under the fourth section equality of charges in the aggregate for long and short hauls is not unlawful provided it does not discriminate against any person or any kind of traffic.<sup>99</sup>

An aggregate charge proportionately less for a longer than for a shorter haul is not forbidden.<sup>1</sup> The fact that a shipper under a joint schedule of rates over two connecting railroads is charged a smaller rate on through shipment over the entire length of the joint line than to intermediate points does not establish a claim that the latter rates are unjust or unreasonable, nor does it entitle him to claim that such rates are discriminative.<sup>2</sup> The prohibition against charging a greater compensation for a shorter haul than for a longer one applies only to cases where the circumstances and conditions of the carriage are substantially similar, and not to cases where the circumstances and conditions are substantially dissimilar.<sup>3</sup> The interests of the public, the shippers, and the

97. *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. C. Rep. 234; *Re Southern R., etc., Assoc.*, 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31.

98. *Interstate Commerce Com. v. East Tennessee, etc., R. Co.*, 85 Fed. 107.

99. *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197; *Interstate Commerce Com. v. Brimson*, 154 U. S. 447; *Gerke Brewing Co. v. Louisville, etc., R. Co.*, 4 Int. Com. Rep. 267, 5 Int. Com. C. Rep. 596; *Lippman v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584; *Detroit, etc., R. Co. v. Interstate Commerce Com.*, 74 Fed. 803.

1. *Business Men's Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 41; *New Orleans Cotton Exch. v. Cincinnati, etc., R. Co.*, 2 Int. Com. Rep.

*nati, etc., R. Co.*, 2 Int. Com. Rep. 289, 2 Int. Com. C. Rep. 375; *Farrar v. East Tennessee, etc., R. Co.*, 1 Int. Com. Rep. 764, 1 Int. Com. C. Rep. 480.

Free cartage for the collection and delivery of freight is a reduction or rebate from schedule rates and is unlawful. *Stone v. Detroit, etc., R. Co.*, 3 Int. Com. Rep. 60, 3 Int. Com. C. Rep. 613.

2. *Allen & Lewis v. Oregon R. & Nav. Co.*, 98 Fed. 16, *Parsons v. Chicago, etc., R. Co.*, 63 Fed. 903; *Tozer v. United States*, 52 Fed. 917; *United States v. Mellen*, 53 Fed. 229.

3. *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648; *Interstate Commerce Com. v. Alabama M. R. Co.*, 168 U. S. 173; *Interstate Commerce Com. v. Cincinnati, etc., R. Co.*, 167

carriers are to be considered in determining this question.<sup>4</sup> Competition between rival carriers affecting rates is a circumstance to be considered, and may be sufficient to render the circumstances and conditions so dissimilar as to justify a greater charge for a shorter than for a longer haul.<sup>5</sup> Where the rates charged by a railroad to a particular point are not unreasonable in themselves, the fact that lower rates are charged for a longer haul to other points does not create an unjust discrimination against such point, in violation of the Interstate Commerce law, where such lower rates are due to active legitimate competition.<sup>6</sup> The possibility of competition arising at a particular point does not render freight rates to that point, though higher than those for a longer haul to a point where competition prevails, obnoxious to the prohibition against a greater charge for a shorter than for a longer haul under

U. S. 479, 56 Fed. 927; Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184; Interstate Commerce Com. v. Western, etc., R. Co., 88 Fed. 192; Junod v. Chicago, etc., R. Co., 47 Fed. 290; Missouri Pac. R. Co. v. Texas, etc., R. Co., 31 Fed. 862; Trammell v. Clyde Steamship Co., 4 Int. Com. Rep. 120, 5 Int. Com. C. Rep. 324; James, etc., Buggy Co. v. Cincinnati, etc., R. Co., 3 Int. Com. Rep. 682, 4 Int. Com. C. Rep. 744; Milwaukee Chamber of Commerce v. Flint, etc., R. Co., 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; Boston, etc., R. Co. v. Boston, etc., R. Co., 1 Int. Com. Rep. 571; Martin v. Southern Pac. R. Co., 2 Int. Com. Rep. 1.

Whether or not the circumstances and conditions are substantially similar is a question of fact. See cases cited above.

4. Louisville, etc., R. Co. v. Behlmer, 175 U. S. 648; Texas, etc.,

R. Co. v. Interstate Commerce Com., 162 U. S. 197; *Re* Southern R., etc., Assoc., 1 Int. Com. Rep. 278.

5. Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197; Wight v. United States, 167 U. S. 512; Savannah Bureau of Freight, etc., v. Charleston, etc., R. Co., 7 Int. Com. Rep. 479; Brewer v. Central of Ga. R. Co., 84 Fed. 258; Rice v. Atchison, etc., R. Co., 3 Int. Com. Rep. 263, 4 Int. Com. C. Rep. 228; Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 683; Interstate Commerce Com. v. Atchison, etc., R. Co., 50 Fed. 295; Lincoln Board of Trade v. Missouri Pac. R. Co., 2 Int. Com. Rep. 98; Interstate Commerce Com. v. Baltimore, etc., R. Co., 145 U. S. 263; *Ex parte* Koehler, 31 Fed. 315; New Orleans Cotton Exch. v. Cincinnati, etc., R. Co., 2 Int. Com. Rep. 289, 2 Int. Com. C. Rep. 375.

6. Interstate Commerce Com. v. Southern R. Co., 122 Fed. 800.

substantially similar circumstances and conditions. The same evidence which warrants a finding that dissimilar circumstances and conditions exist which justify a lower rate for a longer haul to one point than for a shorter haul to another also establishes that the charging of such rates does not give one point an undue preference and advantage over the other.<sup>7</sup> Competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstances and condition provided for by this section, and may justify a lesser charge for the longer than the shorter haul.<sup>8</sup> Competition which is actual and substantial in its effect upon rates, if resulting from the action of other carriers who are subject to the act to regulate commerce, may produce the dissimilarity of circumstances and conditions provided for in this section, so as to enable a carrier, in adjusting rates, to take into view such competition without the previous assent of the Interstate Commerce Commission.<sup>9</sup> The Interstate Commerce law was enacted to encourage normal competition, but it is not in accord with the spirit or letter of that law to recognize, as a condition justifying discrimination against one locality, competition at a more distant locality, when competition at the nearer point is stifled or reduced, not by normal restrictions, but by agreement between those who otherwise would be competing carriers. The difference in conditions thus produced is effected by a restraint upon trade and commerce, which is not only violative of the common law, but of the federal anti-trust act.<sup>10</sup>

7. *Interstate Commerce Com. v. Louisville & N. R. Co.*, 190 U. S. 273, 23 S. Ct. 687, 47 L. Ed. 1047; *Interstate Commerce Com. v. Nashville, etc., R. Co.*, 120 Fed. 934, 57 C. C. A. 224.

8. *Interstate Commerce Com. v. Southern R. Co.*, 122 Fed. 800; *Interstate Commerce Com. v. Alabama Midland R. Co.*, 169 U. S. 173; *Louisville, etc., R. Co. v. Behlmer*, 175 U.

S. 648; *Interstate Commerce Com. v. Western, etc., R. Co.*, 88 Fed. 186.

9. *Interstate Commerce Com. v. Clyde S. S. Co.*, 181 U. S. 29, 21 S. Ct. 512, 45 L. Ed. 729; *East Tennessee, etc., R. Co. v. Interstate Commerce Com.*, 181 U. S. 1, 21 S. Ct. 516, 45 L. Ed. 719.

10. *East Tennessee, etc., R. Co. v. Interstate Commerce Com.*, 99 Fed. 52, 29 C. C. A. 413; *Interstate Com-*

By the amendment of June 18, 1910, the provisions of section 4 were changed by striking out the phrase "under substantially similar circumstances and conditions," which was in the original act and had been the cause of much contention in the courts, by the words "or route" after the words "over the same line," and by adding thereto the further proviso "that no rates or charges lawfully existing at the time of the passage of this Amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission," and by adding thereto the further provision that "whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless, after hearing by the Interstate Commerce Commission, it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."<sup>11</sup>

No undue prejudice to an intermediate point, in violation of Interstate Commerce Act, Feb. 4, 1887, § 3, can be predicated merely on the fact that a rail carrier charges a less rate to a terminal point on the Pacific Coast, where such rate is forced by competition.<sup>12</sup> Under Interstate Commerce Act, Feb. 4, 1887, § 4, in an action by a carrier to recover a greater rate for a shorter than for a longer haul, an answer alleging that there existed no reason, by way of the peculiar geographical position, competition, or trade,

merce Com. v. Alabama M. R. Co., 168 U. S. 144, 164, 167, 18 S. Ct. 45, 42 L. Ed. 414; United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007; United States v. Joint Traffic Assoc., 171 U. S. 505, 19 S. Ct. 25, 43 L. Ed. 259; United States v. Addy-

ston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141.

11. See Appendix A for text of the Act.

12. Atchison, etc., Ry. Co. v. United States, 191 Fed. 856 (U. S. Com. Ct.)

or other conditions why a greater charge should be made for the shorter haul, showed that the rate was illegal and not recoverable.<sup>13</sup> The first proviso of Interstate Commerce Act, Feb. 4, 1887, § 4, as amended by Act June 18, 1910, § 8, authorizing the Interstate Commerce Commission in special cases, after investigation, to exempt a carrier from the prohibition against charging a lower rate for a long than for a short haul, is to be construed in harmony with the other provisions of the act, and as not giving the Commission an unlimited discretion, but imposing upon it, not merely the right, but the duty, to grant such exemption whenever, on investigation, it shall find that no violation of any section of the act would thereby be involved. As so construed, the section is constitutional.<sup>14</sup>

### § 20. Schedules of rates, fares and charges.

The sixth section of the Interstate Commerce Act makes it the duty of every common carrier subject to its provisions to print and keep for public inspection schedules showing the rates, fares, and charges for transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad.<sup>15</sup> It is further provided that the

13. *Great Northern Ry. Co. v. Loonan Lumber Co.*, 25 S. D. 155, 125 N. W. 645.

14. *Atchison, etc., Ry. Co. v. United States*, 191 Fed. 856 (U. S. Com. Ct.)

15. *Boston Fruit, etc., Exch. v. New York, etc., R. Co.*, 3 Int. Com. Rep. 493, 4 Int. Com. C. Rep. 664; *New Orleans Cotton Exch. v. Louisville, etc., R. Co.*, 3 Int. Com. Rep. 523, 4 Int. Com. C. Rep. 694; *United States v. Howell*, 56 Fed. 21; *New York Board of Trade, etc., v. Pennsylvania R. Co.*, 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145;

*Re Passenger Tariffs*, 2 Int. Com. Rep. 445, 2 Int. Com. C. Rep. 649; *Re Tariffs of Columbus, etc., R. Co.*, 2 Int. Com. Rep. 11, 1 Int. Com. C. Rep. 626; *Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co.*, 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465, applies to passengers' excursion rates; *Larrison v. Chicago, etc., R. Co.*, 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 167, applies to excursion rates; *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 43 Fed. 37; *Matter of Grand Trunk R. Co.*, 2 Int. Com. Rep. 496, 3 Int. Com. C. Rep. 89, schedules on international roads;



schedules shall plainly state the places upon its railroads between which property and passengers will be carried, shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, and charges.<sup>16</sup> Contracts are presumed to have been made with reference to such schedule rates.<sup>17</sup> It is made unlawful for a common carrier, after it has established and published its schedule of rates, fares, and charges as prescribed by the act, to charge, demand, collect, or receive from any person a greater or less compensation for transportation of persons or property, or for any service connected therewith, than is specified in such published schedule of rates, fares, and charges.<sup>18</sup> Connivance of a shipper to secure lower rates is a misdemeanor.<sup>19</sup> It is further provided that no advance shall be made in the rates, fares, and charges which have been so established and published, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect.<sup>20</sup> A contract by a railroad company to furnish to the publisher of a magazine, as called for, transportation amounting to a certain sum at schedule rates in payment for a stated amount of advertising,

*Re* Tariff of Trans-continental Lines, 2 Int. Com. Rep. 203, 2 Int. Com. C. Rep. 324; Chicago, etc., R. Co. v. Osborne, 52 Fed. 912, publication of tariff at non-competing point unnecessary; Dillingham v. Fischl, 1 Tex. Civ. App. 546.

16. *Wight v. United States*, 167 U. S. 512; *Lehmann v. Texas, etc., R. Co.*, 3 Int. Com. Rep. 706, 3 Int. Com. C. Rep. 44.

17. *Gerber v. Wabash R. Co.*, 63 Mo. App. 145.

18. *United States v. Mellen*, 53 Fed. 229; *United States v. Michi-*

*gan Cent. R. Co.*, 43 Fed. 26; *Wight v. United States*, 167 U. S. 512; *Mobile, etc., R. Co. v. Desmukes*, 94 Ala. 131; *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553.

19. *United States* 1. Howell, 56 Fed. 21.

20. *New York Produce Exch. v. New York Cent. etc., R. Co.*, 2 Int. Com. Rep. 553, 3 Int. Com. C. Rep. 137; *Re Passenger Tariffs, etc., Wars*, 2 Int. Com. Rep. 340, 2 Int. Com. C. Rep. 513.

which has no fixed value, is in violation of the provision of section six of the Interstate Commerce Act March 2, 1889, as amended by Hepburn Act June 29, 1906, prohibiting any carrier from accepting "greater or less or different" compensation than that named in the published schedules.<sup>21</sup>

A carrier may lawfully grant shippers of coal doing their own hauling to the station a reasonable allowance from the published tariff, which, though naming the rate as from the station to the destination, is uniformly construed to include the haul from the mine.<sup>22</sup> A railroad company which as initial carrier received an interstate shipment to be transported over its own and other lines under a joint through rate established and filed was not authorized to divert the shipment to another road, not a party to the joint rate, because its connecting carrier refused to receive it, and is liable to the shipper for the excess of freight charged resulting from such diversion.<sup>23</sup> The acceptance of advertising by a carrier in lieu of money in payment of interstate transportation furnished to the publisher, his employes, and the immediate members of his and their families, violates the provisions of the Act to Regulate Commerce, Feb. 4, 1887, and Act Feb. 19, 1903, and Act June 29, 1906, amendatory thereof, prohibiting the furnishing of interstate transportation for a less or different compensation than that specified in the carrier's published rates.<sup>24</sup> A carrier engaged in interstate commerce cannot lawfully charge, collect, or receive anything but money for transportation on its road since the enactment of Act June 29, 1906, prohibiting any carrier from demanding, collecting, or receiving a "greater or less or different compensation" for the transportation of persons or property, or for any service in

21. *United States v. Chicago, etc., Ry. Co.*, 163 Fed. 114.

22. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230, U. S. 247, 33 Sup. Ct. 916.

23. *Louisville & N. R. Co. v. Dickerson*, 191 Fed. 705, affg. judg. D'ek-

erson v. *Louisville & N. R. Co.*, 187 Fed. 874.

24. *Chicago, etc., Ry. Co. v. United States*, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. Ed. —, affg. judg. *United States v. Chicago, etc., Ry. Co.*, 163 Fed. 114.

connection therewith, than that specified in its published schedule of rates.<sup>25</sup>

Under the provisions of section 6 of the Interstate Commerce Act, as amended by Act June 29, 1906, § 2, which require railroad companies to adhere to their filed and published rates, a shipper who delivers property for carriage has a contract right to the rates and all privileges and facilities specified in the schedules then in force.<sup>26</sup> Under the provisions of section 6 of the act, a carrier must file with the Commission its schedule of rates and distribute them so that shippers may have access to them and ascertain their terms.<sup>27</sup> The schedules of fares and charges and the regulations filed with the Interstate Commerce Commission by the carrier under the Hepburn Act are controlling between the carrier and the shipper.<sup>28</sup> An interstate shipment cannot be made without the establishment and publication of a through rate or the ascertainment and application of the aggregate of the local rates as approved by the Interstate Commerce Commission.<sup>29</sup> Where a

25. *Louisville & N. R. Co. v. Motley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. —, revg. decree 133 Ky. 652, 118 S. W. 982.

An interstate carrier cannot make a valid contract to issue annual passes for life in consideration of a release of a claim for damages since the enactment of Act June 29, 1906, § 6, expressly prohibiting any carrier from demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in its published schedule of rates. *Id.*

26. *American Sugar Refining Co. v. Delaware, etc., R. Co.*, 207 Fed. 733.

27. *Oregon R. & Nav. Co. v. Thisler* (Kan.), 133 Pac. 539.

It must promulgate and distribute

the tariff in printed form in the offices of its agents. *Hunter v. St. Louis & S. F. R. Co.*, 167 Mo. App. 624, 150 S. W. 733.

28. *Ford v. Chicago, etc., Ry. Co.* (Minn.), 143 N. W. 249.

29. *Wabash R. Co. v. Priddy* (Ind.), 101 N. E. 724.

Under the Interstate Commerce Act Feb. 4, 1887, as amended June 29, 1906, § 7, when joint or local rates applicable to a through shipment are filed with the Interstate Commerce Commission and approved, they become binding on both the shipper and the carrier. *Id.*

Rates fixed and published by the Interstate Commerce Commission must be considered reasonable and must stand until the rate is changed upon application to the commission. *Id.*

railroad company seasonably made out and filed its traffic schedules, as required by Interstate Commerce Act, § 6, and forwarded copies to its local agents, the fact that some of its local agents failed to post them did not invalidate the rates established.<sup>30</sup> The erroneous quotation by an agent of an interstate carrier of a lower freight rate than that fixed by the published tariff gives no right of action to a shipper who sustains injury by acting on the faith of the quoted rate, though such tariff was not posted in the carrier's local station.<sup>31</sup> Interstate freight rates are established when the schedules are printed and filed, though the rates may not be posted in public places, as required by Interstate Commerce Act, Feb. 4, 1887, § 6, as amended by Act March 2, 1889, § 1.<sup>32</sup> Compliance with Interstate Commerce Act, Feb. 4, 1887, § 6, as amended by Act June 29, 1906, § 2, as to posting copies of schedules and tariffs, is not essential to bring a tariff within such act and making it a misdemeanor for a shipper to accept rebates.<sup>33</sup> A carrier, filing its rates with the Interstate Commerce Commission as required by Interstate Commerce Act, Feb. 4, 1887, and the various amendatory acts, is barred from making any agreement for a greater or less rate than that prescribed by the rates filed, though it failed to post and publish the rates as prescribed by the act, but

30. *Louisville & N. R. Co. v. Allen*, 152 Ky. 145, 153 S. W. 198.

31. *Illinois Cent. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 33 Sup. Ct. 176, — L. Ed. —.

32. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 32 Sup. Ct. 316, 56 L. Ed. 556, revg. judg. 79 Kan. 59, 99 Pac. 819.

The sanction of other roads to schedules of freight rates is not essential to the establishment of such rates in a proceeding involving shipments over such railroad and connecting lines. *Id.*

Schedules of freight rates of a designated railroad "in connection with" other specified roads may be made applicable to a shipment over different railroad from a city which is not a common point. *Id.*

See also, as to the rule stated in the text, *Baltimore, etc., Ry. Co. v. New Albany Box & Basket Co.*, 48 Ind. App. 647, 94 N. E. 906; *Contra*, *Pecos River R. Co. v. Reynolds Cattle Co.* (Tex. Civ. App.), 135 S. W. 162.

33. *United States v. Miller*, 223 U. S. 599, 32 Sup. Ct. 323, 56 L. Ed. 568, revg. judg. 187 Fed. 375.

only posted a card to the effect that the rates were in charge of an agent in an office, and kept there for the convenience of the public.<sup>34</sup>

The mere filing of schedules of rates with the Interstate Commerce Commission raises no inference that the Commission agrees to such rates, or all the proposed conditions of shipment.<sup>35</sup> Under the provisions of the Interstate Commerce Act, that no carrier shall charge, demand, collect, or receive a greater or less compensation for service than the rates, fares, and charges specified in the tariff filed and in effect at the time, a willful demand of more than the tariff rates by a carrier is of equal criminality with an actual collection thereof.<sup>36</sup> Where a carrier makes its schedules of rates and files them with the Interstate Commerce Commission, which approves and promulgates them as required by Interstate Commerce Act, Feb. 4, 1887, the carrier and shipper must observe them, and any known departure therefrom will subject them to a fine.<sup>37</sup> Carriers separately state the terminal charges for delivering live stock beyond their own lines to the Union Stockyards in Chicago, as required by Act June 29, 1906, § 2, where their tariff schedules inform shippers that the live stock rates to Chicago apply only to deliveries at the carriers' own yards and that, for transportation to the Union Stockyards, a stated additional charge will be made, the amount of such charge being entered, not upon the general

34. *Houseman v. Fargo*, 124 N. Y. Supp. 1086.

That a carrier failed to post its schedules and tariff sheets in a depot, as required by the interstate commerce law, does not affect the validity of the rates promulgated, filed with the Interstate Commerce Commission, and deposited with the station agent. *Mires v. St. Louis & S. F. R. Co.*, 134 Mo. App. 379, 114 S. W. 1052.

Where a carrier has promulgated its rates under the interstate commerce law, and has complied with the statute by filing a copy of the

schedule with the commission, deposited a copy with its agent, and posted copies in two conspicuous places in the depot, shippers are presumed to know the existence of the schedules and the rates contained therein. *Id.*

But see *Wabash R. Co. v. Sloop*, 200 Mo. 198, 98 S. W. 607.

35. *Cramer v. Chicago, etc., Ry. Co.*, 153 Iowa, 103, 133 N. W. 387.

36. *United States v. Texas & P. R. Co.*, 185 Fed. 820.

37. *Illinois Cent. R. Co. v. Henderson Elevator Co.*, 138 Ky. 220, 127 S. W. 779.

freight charges of the companies, but as a separate item.<sup>38</sup> Freight rates required to be established by carriers, according to the provisions of section 6 of the Interstate Commerce Law, Feb. 4, 1887, as amended by Act March 2, 1889, § 1, are not established by tariffs naming class rates that do not contain a classification of freight, but merely refer to a classification published by other parties and subject to change by such parties. A departure by a shipper from such rates does not constitute an offense under Elkins Act, Feb. 19, 1903, § 1.<sup>39</sup> "Rates in force," to which Interstate Commerce Act, Feb. 4, 1887, § 1, applies, are not limited to rates under which transportation has actually taken place, but are those which the carrier has established as its present charges for transportation, as distinguished from those which are obsolete, tentative, or perhaps only to take effect in the future. They are rates open to public inspection and on which shipments may be made, if offered.<sup>40</sup> An unreasonable contract limiting the carrier's liability on an interstate shipment of horses, is invalid though the carrier had filed schedule of rates and contracts with the Interstate Commerce Commission.<sup>41</sup>

38. *Interstae Commerce Commission v. Stickney*, 215 U. S. 98, 30 Sup. Ct. 66, 54 L. Ed. —, affg. decree 164 Fed. 638.

39. *United States v. Standard Oil Co.*, 170 Fed. 988.

40. *New York Cent., etc., R. Co. v. United States*, 166 Fed. 267, 92 C. C. A. 331, revg. judg. *United States v. New York Cent., etc., R. Co.*, 153 Fed. 630.

**Separately established rate.**—A rate established by a railroad company between points in the same State, was held, on the facts shown, a "separately established rate" over a "through route" established by such company and another for interstate shipments, within the mean-

ing of section 6 of Interstate Commerce Act Feb. 4, 1887, as amended by Act June 29, 1906, § 2, and as subject to regulation by the Interstate Commerce Commission. *Denver & R. G. R. Co. v. Interstate Commerce Commission*, 195 Fed. 968.

**Showcases are "furniture"** within the ordinary meaning of the word, which governs in the construction of tariff schedules published for the information of the public, and are included in a commodity rate on "furniture (new) of all kinds." *Chicago, etc., R. Co. v. Feintuch*, 191 Fed. 842.

41. *Blair & Jackson v. Wells Fargo & Co. (Iowa)*, 135 N. W. 615.

Interstate freight rates are established when a schedule thereof is filed by a carrier with the Interstate Commerce Commission and copies are furnished by the railway company to its freight offices, although such rates may not be "posted," as required by section 6 of the Act to Regulate Commerce, as amended March 2, 1889, which is not a condition precedent to the establishment and putting in force of the tariff of rates, but is a provision based upon the existence of an established rate, which has for its object the affording of special facilities to the public for ascertaining the rates actually in force.<sup>42</sup> Where property is carried under an aggregate through rate, which is the sum of the ocean rate and the rate from or to a place in the United States to or from the port of transshipment or of entry, the latter rate is required to be filed and published, under Act Feb. 4, 1887.<sup>43</sup> If property is carried under a joint through rate by virtue of a common control or arrangement of inland and ocean carriers, the joint rate is required to be filed and published, under Act Feb. 4, 1887.<sup>44</sup> The rates of transportation from places in the United States to ports of transshipment and from ports of entry to places in the United States of property in foreign commerce, carried under through bills of lading, are required to be filed and published by the amended Interstate Commerce Act, Feb. 4, 1887.<sup>45</sup> Under Interstate Commerce Act, Feb. 4, 1887, § 6, as amended March 2, 1889, § 1, requiring several common carriers operating a through line engaged in interstate commerce to file schedules of rates constituting the basis of a through interstate rate, each carrier, though operating a line wholly within a State, which line is a portion of a through route engaged in interstate commerce through a common arrangement between several connecting carriers, is bound to comply with such act.<sup>46</sup> Where

42. *Texas & P. Ry. Co. v. Cisco Oil Mill*, 204 U. S. 449, 27 Sup. Ct. 258, 51 L. Ed. 562.

43. *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135.

44. *Armour Packing Co. v. United States*, *supra*.

45. *Armour Packing Co. v. United States*, *supra*.

46. *United States v. New York Cent., etc., R. Co.*, 153 Fed. 630.

carriers have filed and published schedules of joint through rates, it is the right of a shipper to have his property transported upon the lines joining in such schedules and at the rates therein specified, and the carrier receiving it cannot avoid its obligation by any contract inserted in its bill of lading.<sup>47</sup> A tariff rate between two points on different railroads, filed and published by one company and concurred in by the other, which does not designate any particular route, must be held as a matter of law to apply to the natural and direct route over the lines of the two companies between the designated points, and to constitute the lawful rate over such route.<sup>48</sup>

Under Interstate Commerce Act, Feb. 4, 1887, § 6, as amended by Act June 29, 1906, a provision in a passenger's ticket sold by a railroad company making it nontransferable, where no such limitation is shown in the company's schedule, is unlawful and void, and the company cannot maintain a suit in equity based on such provision to enjoin transfers of such tickets.<sup>49</sup> Demurrage charged for the detention of cars in loading and unloading is a terminal charge, required to be shown by the schedules of rates filed and published by an interstate railroad company by the terms of the Interstate Commerce Act, Feb. 4, 1887, §§ 1, 6, as subsequently amended by Act June 29, 1906, §§ 1, 2, which define transportation as including all the instrumentalities and facilities of shipment and all services in connection with the receipt, delivery, and handling of property transported, and require the filing and publishing of schedules showing all the rates, fares, and charges for transportation, stating separately all terminal charges.<sup>50</sup>

Semble, that a railroad company engaged in interstate commerce

47. *Dickerson v. Louisville & N. R. Co.*, 187 Fed. 874.

48. *Standard Oil Co. of New York v. United States*, 179 Fed. 614, 103 C. C. A. 172.

49. *Baltimore & O. R. Co. v. Hamburger*, 155 Fed. 849.

50. *Lehigh Valley R. Co. v. United States*, 188 Fed. 879, 110 C. C. A. 513, affg. judgs. *United States v. Philadelphia & R. Ry. Co.*, 184 Fed. 543, and *United States v. Lehigh Valley R. Co.*, 184 Fed. 546.



in its schedules of rates and classifications filed with the Interstate Commerce Commission pursuant to Act Feb. 4, 1887, § 6, may state separately its rates for the carriage of ordinary commodities of a particular class and its charge for icing cars when commodities of the same class are of a character requiring to be shipped under refrigeration, and that its collection of both charges when refrigeration is used is lawful, provided they are each reasonable and do not cover double compensation for the same service.<sup>51</sup> Under Interstate Commerce Act, § 6, it is only the "business" of a common carrier which cannot be exercised without filing rates, and a railroad company is not prohibited from receiving freight for transportation to another state by the fact that no through route and joint rates have been established between the points of shipment and delivery.<sup>52</sup>

## § 21. Change of rates.

It is not a violation of the Interstate Commerce Act for a railroad company to make a difference in rates for the transportation of merchandise between different seasons of the year, carrying the same articles at a lower rate during the summer, or dull months, than during the winter, or busy months.<sup>53</sup> There is no presumption of wrong arising from a change of rates by a carrier.<sup>54</sup> Where a tariff has been established on a commodity for a through interstate shipment, as provided by Interstate Commerce Act, Feb. 4, 1887, c. 104, § 6, there can be no departure therefrom unless made according to law.<sup>55</sup> Where common laundry soap in less than carload lots was assigned to the fourth class in the first classifica-

51. *Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co.*, 148 Fed. 968, 79 C. C. A. 46.

52. *Reid v. Southern Ry. Co.*, 153 N. C. 490, 69 S. E. 618.

53. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 73 Fed. 409.

54. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. Ed. 705, affg. judg. 141 Fed. 1003.

55. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

tion made under the Interstate Commerce Act, and was voluntarily maintained there by defendant railroad company for more than 13 years, defendants were not justified in reclassifying such freight so that it would pay 20 per cent. less than third class rates, without changing the carload classification, on the mere claim that the prior classification had been inadequate to pay the cost of carriage in less than carload lots, there having been no general reclassification which would proximately apportion the cost of the service equally among the different articles of traffic as between carloads and less than carload lots.<sup>56</sup>

## § 22. Charges in general.

Just compensation, secured by the Constitution of the United States, does not mean a guaranty to a carrier as against the public of any fixed percentage of profit on an investment.<sup>57</sup> Where a freight rate fixed by the Interstate Commerce Commission not only was sufficient to cover the costs of the service, the operating costs fairly apportionable to the particular traffic, and to contribute to some extent to interest, charges, and dividends, it was not arbitrary or unreasonable.<sup>58</sup> Where no specific rate from point of origin to destination of a through shipment is provided, and no specific manner of constructing the combination rate for it is

56. *Cincinnati, etc., Ry. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 27 Sup. Ct. 648, 51 L. Ed. 995, affg. decree Interstate Commerce Commission v. *Cincinnati, etc., Ry. Co.*, 146 Fed. 559.

57. *Lehigh Valley R. Co. v. United States*, 204 Fed. 986.

58. *Atchison, etc., Ry. Co. v. United States*, 203 Fed. 56 (U. S. Com. Ct.)

A freight rate on a particular commodity fixed by the Interstate Commerce Commission is not necessarily objectionable as confiscatory on the theory that it was insufficient to pay

its proportionate share of the carrier's entire operating expenses and a profit in addition. *Id.*

Fixing of an interstate freight rate at a sum not exceeding the out-of-pocket expense of the service would be invalid, in the absence of extraordinary circumstances and conditions justifying such action. *Id.*

An order of the Interstate Commerce Commission establishing a rate of \$1 a hundred on lemons from California to Atlantic Coast points held not arbitrary or inherently unreasonable. *Id.*

prescribed, the lowest combination of rates applicable over the route is the lawful rate.<sup>59</sup> An initial carrier of an interstate shipment, which furnishes two small cars in lieu of a larger car ordered by the shipper, is, under a rule of the Interstate Commerce Commission, limited to the rate applicable to the larger car.<sup>60</sup> Shipments over connecting lines must, under Interstate Commerce Act, Feb. 4, 1887, take the lawfully established rate on each line, where there is no established joint rate.<sup>61</sup> That a railroad company increased a rate from what it had previously been raises no presumption that the new rate is unjust or unreasonable.<sup>62</sup> An unreasonably high rate on the traffic and between the points to which an order of the Interstate Commerce Commission relates, which reduces such rate, cannot be justified on the ground that it is necessary to sustain some other rate.<sup>63</sup> Where a freight rate has been duly fixed by the Interstate Commerce Commission and posted by a railroad company, a lesser rate contracted for between the shipper and a company, whether intentional or through mistake, is not binding, and the company can hold the freight until the legal rate is paid.<sup>64</sup> Since carriers engaged in interstate commerce are entitled to impose, as a condition to hauling private

59. *Pecos & N. T. Ry. Co. v. Porter* (Tex. Civ. App.), 156 S. W. 267.

Where a commodity rate is named in a tariff on a commodity and between specified points, the commodity rate is the lawful rate, though a class rate or some combination may make a lower rate. *Id.*

60. *Yorke Furniture Co. v. Southern Ry. Co.* (N. C.), 78 S. E. 67.

61. *Kansas City S. R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 32 Sup. Ct. 316, 56 L. Ed. 556, revg. judg. 79 Kan. 59, 99 Pac. 819.

62. *Louisville & N. R. Co. v. Interstate Commerce Commission*, 195 Fed. 541.

A rate voluntarily established by

a railroad company to meet competition is not to be taken as the measure of what is reasonable. *Id.*

The mere fact that a rate established by a carrier is higher one way between the same points than it is the other does not prove that the higher rate is unreasonable. *Id.*

That advances in rates on certain goods would be severely felt by certain shippers is not a sufficient reason for holding that they were not properly made. *Id.*

63. *Norfolk & W. Ry. Co. v. United States*, 195 Fed. 933.

64. *Sutton v. St. Louis & S. F. R. Co.*, 159 Mo. App. 685, 140 S. W. 76.

cars, such terms as have a reasonable relation to the transportation service in which they are employed, and may adopt such rules as will tend to provide a reasonably dependable supply of equipment and prevent the withdrawal of such cars at will, to serve the private purposes of the owners and as will keep them in active and steady use, a rule imposing a reasonable demurrage charge on such cars while standing on private tracks and while returned unloaded until the lading is removed and the cars released, is reasonable and not violative of the owner's rights.<sup>65</sup> Transportation of cars and freight intended for interstate commerce to and from industrial plants located from one-fifth of a mile to seven miles from the main track of the carrier is not the same service which the carrier performs when it delivers freight at its depot or team tracks, the carrier being bound to perform such industrial track service, in the absence of statute, only under an arrangement with the owner of the industrial plant, for which it may charge a reasonable compensation.<sup>66</sup> A violation of Interstate Commerce Act, Feb. 4, 1887, § 10, providing that, if a carrier willfully violates any provisions of the act, it shall be liable for penalty, is not made out by proof of an overcharge due to accident or mistake, but is only established by evidence of a willful act or omission.<sup>67</sup> A terminal charge for delivering car loads of live stock to the Union Stock Yards in Chicago, a point beyond the carrier's line, if in itself just and reasonable, and separately stated in the tariff schedules, as required by Act June 29, 1906,

65. *Proctor & Gamble Co. v. United States*, 188 Fed. 221.

66. *Atchison, etc., Ry. Co. v. Interstate Commerce Commission*, 188 Fed. 229; *Southern Pac. Co. v. Interstate Commerce Commission*, 188 Fed. 241.

Under the facts in this case the general traffic rate for interstate freight does not include delivery to an industrial plant of the consignee

or the transportation of the cars from the industrial plant of the shipper to the carrier's yards or main line over a distance varying from one-fifth of a mile to seven miles, but the carrier performing such service is entitled to exact a reasonable charge therefor. *Id.*

67. *United States v. Texas & P. R. Co.*, 185 Fed. 820.

§ 2, cannot be condemned or the carrier required to reduce it, on the ground that it, taken with prior charges of transportation over the lines of the carrier, or of connecting carriers, makes the total charge to the shipper unreasonable.<sup>68</sup> Railway companies may contract with shippers for a single transportation or for successive transportations, subject to a change of rates in the manner provided in the Interstate Commerce Act.<sup>69</sup> Railway companies, in fixing their rates, may take into account competition with other carriers, provided that such competition is genuine.<sup>70</sup> Where the charges of a railroad for demurrage are based on tariffs filed with the Interstate Commerce Commission, as provided by the Interstate Commerce Act, such charges as to cars engaged in interstate commerce are conclusively presumed reasonable in a State court, in the absence of any action of the commission thereon.<sup>71</sup> Where the facts are such that it is not clear that the conditions are so dissimilar as to render the Interstate Commerce Act or a rate published thereunder inapplicable, such rate will be held to control in a civil proceeding.<sup>72</sup>

In determining whether a State statute regulating railroad rates is confiscatory with respect to a given railroad company doing both interstate and intrastate business, the only question is whether its earnings under such rates from its intrastate business, after deducting the expenses properly chargeable thereto, are remunerative, taking its property within the State at a fair valuation, and its earnings from interstate or outside business are immaterial.<sup>73</sup> A freight charge made by a common carrier which conforms to the schedule of rates required to be filed and published

68. *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 30 Sup. Ct. 66, 54 L. Ed. —, affg. decree *Stickney v. Interstate Commerce Commission*, 164 Fed. 638.

69. *Interstate Commerce Commission v. Chicago G. W. Ry. Co.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. Ed. 705, affg. judg. 141 Fed. 1003.

70. *Interstate Commerce Commission v. Chicago G. W. Ry. Co.*, *supra*.

71. *Erie R. Co. v. Wanaque Lumber Co.*, 75 N. J. L. 878, 69 Atl. 10.

72. *Coeur D'Alene & S. Ry. Co. v. Union Pac. R. Co.*, 49 Wash. 244, 15 Pac. 71.

73. *St. Louis & S. F. R. Co. v. Hadley*, 168 Fed. 317.

by the Interstate Commerce Act is *prima facie* a reasonable charge.<sup>74</sup> No presumption of law that a freight rate upon a particular commodity is reasonably low exists because such rate has been duly published and filed by the carrier with the Interstate Commerce Commission.<sup>75</sup> Expenditures for permanent improvements and equipment should not be charged to the current or operating expenses of a single year for the purpose of testing the reasonableness of an increased freight rate.<sup>76</sup> Under Interstate Commerce Act, Feb. 4, 1887, as supplemented by the Elkins Act, Feb. 19, 1903, an initial carrier which has become a party to a joint through rate for the transportation of property over its own and connecting lines between two points in different states, which rate has been filed and published as required by the act, cannot lawfully transport property between such points at a less and unpublished rate over another route and with different connections.<sup>77</sup> The words "between two points," in section 6 of the act, does not limit such action to points on the established route, but the section prohibits the transportation of property between terminals in different States at a greater or less rate than the established rate, without reference to routes.<sup>78</sup>

Where a carrier made an unintentional mistake in quoting a freight rate less than the regular tariff rate on file with the Interstate Commerce Commission upon which the shipper fixed a price to be asked a customer for grain shipped and the difference between the quoted rate and the regular rate on file with the Commission was subsequently collected, there could be no recovery by the shipper against the carrier; the Interstate Commerce Act binding both parties.<sup>79</sup>

74. *Baltimore & O. R. Co. v. La Due*, 108 N. Y. Supp. 659, 57 Misc. Rep. 614.

75. *Illinois Cent. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 27 Sup. Ct. 700, 51 L. Ed. 1128.

76. *Illinois Cent. R. Co. v. Inter-*

*state Commerce Commission, supra.*

77. *United States v. Vacuum Oil Co.*, 153 Fed. 598.

78. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

79. *Schenberger v. Union Pac. R. Co.*, 84 Ken. 79, 113 Pac. 433.

### § 23. Special rates.

An agreement with a single shipper for shipment over connecting lines having no joint through rate at less than the local rates for each road is void, and does not prevent collecting the established rates by such carriers, under Interstate Commerce Act, Feb. 4, 1887, § 6, as amended by Act March 2, 1889, § 1.<sup>80</sup> If an agreed rate for the transportation of interstate freight is less than the rate shown by the schedule posted and published as required by Interstate Commerce Act, Feb. 4, 1887, the agreement is illegal and unenforceable.<sup>81</sup> The fixing of the value of property in a bill of lading at less than its actual value for the purpose of limiting the amount of the carrier's liability in case of loss is not a false billing in violation of Interstate Commerce Act, Feb. 4, 1887, § 10, as amended by Act March 2, 1889, § 2.<sup>82</sup> A railway contract, whereby a shipper of lumber is allowed a special rate, in no event to exceed two cents per hundred pounds, which gives such shipper a preference of from one to two cents a pound over other shippers of lumber, is in violation of the Interstate Commerce Law, so that it cannot be enforced as relating to interstate shipments.<sup>83</sup> A contract for shipment of goods from a foreign port to an inland point in the United States for a through rate does not necessarily violate the Interstate Commerce Law, though the proportion of the through rate allowed for the carriage from the port of entry to the destination is less than the rate scheduled for freight originating at such port and carried to such destination.<sup>84</sup> Where a consignee of goods shipped from another State sues the common carrier for the value of goods lost in trans-

**80.** *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 32 Sup. Ct. 316, 56 L. Ed. 556, revg. judg. 79 Kan. 59, 99 Pac. 819.

**81.** *Baltimore & O. R. Co. v. La Due*, 128 App. Div. 594, 112 N. Y. Supp. 964, revg. judg. 108 N. Y.

Supp. 659, 57 Misc. Rep. 614.

**82.** *George N. Pierce Co. v. Wells Fargo & Co.*, 189 Fed. 561, 110 C. C. A. 645.

**83.** *Kizer v. Texarkana, etc., Ry. Co.*, 66 Ark. 348, 50 S. W. 871.

**84.** *Southern Pac. Co. v. Redding*, 17 Tex. Civ. App. 440, 43 S. W. 1061.

sit, his right to recover their value cannot be limited by the contract of shipment, which provided that in consideration of reduced rates the valuation of the property shipped should not exceed \$5 per 100 pounds, and the carrier's liability should not exceed that amount, since such contract violates Interstate Commerce Act, § 2, forbidding special rates.<sup>85</sup> Under Interstate Commerce Act, Feb. 4, 1887, § 6, and Mississippi Code, 1892, § 4292, a contract by a railroad company to charge no greater rate from a certain factory to competitive points than was charged from certain other places, and to maintain a "milling in transit" agreement, is not illegal on its face, in the absence of any showing that the rates fixed by the contract were different from those approved by the Interstate Commerce Commission and the State Railroad Commission, or that rates had been submitted to the commissions at all before the contract was made.<sup>86</sup>

#### § 24. Pooling of freights or dividing earnings.

Any arrangement, oral or otherwise, or combination, which has for its purpose and eventuates in the pooling of freights of different and competing railroads, comes within the inhibition of the Interstate Commerce Act Feb. 4, 1887. Either a distribution of property offered for transportation among different and competing roads in proportions and on percentages previously agreed upon, or a money pool, whereby the aggregate or net proceeds of certain different and competing roads are divided among them, is prohibited.<sup>87</sup> Where a carrier is a corporation, not only the carrier itself, but the officers individually, are subject to indictment for violation of this section of the Act.<sup>88</sup> The pooling of freights of competing railroads, forbidden by Act Feb. 4, 1887, § 5, is not accomplished by the adoption by common carriers, as

85. *Ward v. Missouri Pac. Ry. Co.*, 158 Mo. 226, 53 S. W. 28.

86. *Laurel Cotton Mills v. Gulf & S. I. R. Co.*, 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

87. *In re Pooling of Freights*, 115 Fed. 588.

88. *In re Pooling of Freights*, 115 Fed. 588.



part of an agreement for a through rate, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guarantying the through rates to the shipper, even though the initial carrier promises fair treatment to the connecting lines, and carries out such promise, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper, and his requests to divert shipments are usually allowed.<sup>89</sup> Section 5 prohibits "contracts" for the division of earnings, and is violated by a contract having that purpose or effect, whether or not an actual division is made; the word "freights" in said section is used as meaning the commodities carried, and not the compensation paid for such carriage.<sup>90</sup> Division of territory among existing roads appears to be forbidden by the Act,<sup>91</sup> but section 5 does not invalidate a contract between two railroad companies, whose lines are parallel, by which certain naturally tributary territory is preserved to each, within which it shall prosecute the work of extending its branch lines, etc., without interference with or from the other, designed to prevent an unprofitable war of construction, though it may prevent certain pooling provisions therein from being operative.<sup>92</sup> The fines and penalties imposed by the agreement of certain railway companies, which enter into an association to control traffic to a common market and maintain rates which are higher than

89. *Southern Pac. Co. v. Interstate Commerce Commission*, 200 U. S. 536, 26 Sup. Ct. 330, 50 L. Ed. 585, rev'g *Interstate Commerce Commission v. Southern Pac. Co.*, 132 Fed. 829.

90. *Interstate Commerce Commission v. Southern Pac. Co.*, 132 Fed. 829, decree rev'd *Southern Pac. Co. v. Interstate Commerce Commission*, 200 U. S. 536, 26 Sup. Ct. 330, 50 L. Ed. 585.

91. *Freight Bureau v. Cincinnati, etc., R. Co.*, 4 Int. Com. Rep. 592, 615, 6 I. C. C. Rep. 195, 245, holding that the division of territory is wholly without warrant in law and is practically a denial to shippers in such territory of the right to ship their goods or produce to market by the line or route they may prefer.

92. *Ives v. Smith*, 55 Hun (N. Y.), 606, 8 N. Y. Supp. 46, aff'g 3 N. Y. Supp. 645.

are reasonable, unjustly prejudicial, and preferential, on members for violation of association rules, the Commission has held, appear on the face of the agreement to be available as substitutes for balances or amounts which would be due under a regular pooling system, and the arrangement under which they are imposed is—if not expressly, at least in legal effect—a combination, contract, or agreement “for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof,” which are forbidden by section 5 of the statute.<sup>93</sup> It was also held by the Commission, under the act as it stood prior to the amendment of 1906 making express companies and carriers by pipe line subject to the act, that the act did not prohibit the pooling of their earnings by independent express companies which were not included among the common carriers subject to the act,<sup>94</sup> and that an agreement for the pooling or division of traffic between a railroad subject to the act and a competing pipe line was not interdicted by the act.<sup>95</sup> The Commission has also held that it is doubtful, at least, whether section 5 of the Act applies to a practice whereby the transportation of immigrants from Atlantic ports westward is divided between the carriers in agreed proportions based upon the proportion of the domestic passenger traffic done by each line, where such a practice cannot be made effective in

93. *Freight Bureau v. Cincinnati, etc., R. Co.*, 4 Int. Com. Rep. 592, 618, 6 I. C. C. Rep. 195, 254. But see *Duncan v. Atchison, etc., R. Co.*, 4 Int. Com. Rep. 385, 396, 6 I. C. Rep. 85, 111, wherein it was held that it had not been shown by the agreement in question itself or other evidence that the object of the association as stated in the agreement and the measures provided therein for fixing and maintaining rates constitute a “contract, agreement or combination” in violation of § 5. or that

those measures if carried out in good faith for the purpose named, indirectly lead to the same result as the actual “pooling of freights” and “division of earnings” forbidden by the statute.

94. *Re Express Companies*, 1 Int. Com. Rep. 677, 683, 1 I. C. C. Rep. 349, 368.

95. *Independent Refiners' Assoc. v. Western, etc., R. Co.*, 4 Int. Com. Rep. 162, 180, 5 I. C. C. Rep. 415, 459.

respect to any other class of business, and the immigrants are carried at domestic published rates, and the arrangements adopted by the carriers in connection with the immigrant authorities of the United States have efficiently promoted the protection and greatly improved the treatment and comfort of immigrants. There is in the Act a specific provision against the pooling or division of freights but no like specific provision in respect to passengers, and no discrimination as against individuals, classes, or localities results from the handling of this immigrant business in this way by the carriers.<sup>96</sup> A combination of railroad companies into joint traffic associations, under articles of agreement by which each road carries the freight it may get, over its own line, at its own rates, and has the earnings to itself, though providing proportional rates, or proportional division of traffic, is not a pooling or traffic on freights, or a division of net proceeds of earnings, within the prohibitions of the Interstate Commerce Law, nor of the Act of 1890 against unlawful restraint and monopolies.<sup>97</sup>

### § 25. Interruption of continuous carriage.

The seventh section of the Interstate Commerce Act makes it unlawful for any common carrier subject to the provisions of the act to enter into any combination, contract, or agreement, express or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no breaking of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freight from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily to interrupt

96. *Re Transportation of Immigrants*, 10 Int. Com. Rep. 13, 26, 10 J. C. C. Rep. 13, 26.

97. *United States v. Joint Traffic Ass'n*, 89 Fed. 1020, 32 C. C. A. 491, aff'g 76 Fed. 895.

such continuous carriage or to evade any of the provisions of the act.<sup>98</sup> If the intent in starting a shipment from a point without a State was that the final destination should be at a point within the State, and such purpose was not abandoned, the shipment would be an interstate one, though there were temporary breaks by transfers from one carrier to another, and a rebilling at each transfer.<sup>99</sup>

Goods cease to be a part of the general mass of property in a State when they have been shipped or entered with a common carrier for transportation to another State.<sup>1</sup> From that time until they reach their destination and become incorporated and mixed up with the mass of property in the State where delivered, they are subjects of interstate commerce.<sup>2</sup> Where transportation of goods destined for a point without the State has been actually begun, temporary stoppage within the State, without the intention of abandoning the original movement (which movement is ultimately completed), will not deprive the transportation of the character of interstate commerce.<sup>3</sup> The shipment of goods by local bill of lading to a point in the State of shipment as, for example, to a forwarding agent in the same State, to be re-shipped by him, without unloading, breaking bulk, or delay, to ultimate consignees in another State, constitutes a single carriage and is interstate commerce, and cannot be regulated by the railroad commission of the State.<sup>4</sup> The continuity of the haul or carriage of freight is not

98. *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 S. Ct. 132, 48 L. Ed. 268; *Interstate Commerce Com. v. Brimson*, 154 U. S. 447; *Matter of Grand Trunk R. Co.*, 2 Int. Com. Rep. 496, 3 Int. Com. C. Rep. 89; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. 567.

99. *Gulf, etc., R. Co. v. Fort Grain Co.* (Tex. Civ. App.), 73 S. W. 845; *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 721, 3 Int. Com. C. Rep. 450, facts held to show that shipment was not a through shipment.

1. *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715.

2. *Leisy v. Hardin*, 135 U. S. 110, 10 Sup. Ct. 681, 34 L. Ed. 132.

3. *Delaware & H. C. Co. v. Commonwealth (Pa.)*, 2 Int. Com. Rep. 223.

4. *Cutting v. Florida Ry. & Nav. Co.*, 46 Fed. 641, 10 Ry. & Corp. L. J. 206; *State v. Gulf, etc., R. Co.* (Tex. Civ. App.), 44 S. W. 542; *Mexican Nat. Ry. v. Savage* (Tex. Civ. App.), 41 S. W. 663; *Houston*

broken in fact and cannot be broken in law by one or more carriers, members of a through line, charging local rates as their proportion of a through rate; nor can the exaction of local rates exempt the carrier from liability under the law by placing him in the attitude of a strictly local carrier, operating under no "common control, management, or arrangement" with the other carriers participating in the through haul. The charge of a local rate and the declaration by a carrier that as to through transportation to certain points on its road it is a local carrier cannot alter the fact. The law regards the substance of things, and a palpable device for the evasion of the law will not be allowed to accomplish its purpose. The facts that the carriage is continuous, that the traffic is through interstate traffic, and that the carrier in due and ordinary course of business accepts and forwards it, are sufficient to establish responsibility under the law.<sup>5</sup> The continuity of a shipment of goods is not broken by a sale of the goods *in transitu*.<sup>6</sup> If, however, the goods are consigned to a dealer and he, selling them before arrival, rebills to the purchaser without breaking bulk, the two carriages are distinct.<sup>7</sup> When railroad companies make a through and continuous line and offer it for the use of the public, they cannot rid themselves of responsibility for unjust charges by breaking the haul in two and calling themselves carriers on the separate ends of their lines.<sup>8</sup>

## § 26. Mileage, excursion, or commutation tickets.

Section twenty-two of the Interstate Commerce Act provides that nothing in the act shall prevent the carriage, storing, or hand-

D. & N. Co. v. Insurance Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17; Texas & P. Ry. v. Avery (Tex. Civ. App.), 33 S. W. 704.

5. Troy Board of Trade v. Alabama Midland Ry., 4 Int. Com. Rep. 348, 6 I. C. C. Rep. 1.

6. Gulf, etc., Ry. v. Fort Grain Co., (Tex. Civ. App.), 72 S. W. 419.

7. Gulf, etc., Ry. v. State, 97 Tex. 274, 78 S. W. 495.

8. Brady v. Parkhurst v. Pennsylvania R. Co., 2 Int. Com. Rep. 78, 2 I. C. C. Rep. 131; Re Grand Trunk Ry., 2 Int. Com. Rep. 496, 3 I. C. C. Rep. 89.

ling of property free or at reduced rates in certain enumerated cases, or the carriage of certain enumerated classes of persons free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets.<sup>9</sup> This provision has been filed not to be exclusive so as to prevent any discrimination other than as therein specified.<sup>10</sup> The families of officers and employes of the road are not included in any of the exceptions in this section.<sup>11</sup> A person who receives free transportation for favoring the company in a business way is not an employe.<sup>12</sup> Issuing free passes to persons eminent in the public service, high officers of the States, prominent officials of the United States, members of the legislative railroad committees of the several States, and persons whose good will was claimed to be important to the company, is a violation of the act.<sup>13</sup> Party-rate tickets, while neither mileage or excursion tickets, have been held to be commutation tickets, the rate being commuted in consideration of the frequency or quantity of the traffic, and are exempted from the provisions of the act.<sup>14</sup>

## § 27. Authority of Commission as to regulations or practices affecting rates.

Authority to regulate the distribution of a railway company's

9. See *Re Inmates of National Homes*, 1 Int. Com. Rep. 75, 1 Int. Com. C. Rep. 28, as to disbaid soldiers and sailors; *Re Religious Teachers*, 1 Int. Com. Rep. 21; *Smith v. Northern Pac. R. Co.*, 1 Int. Com. Rep. 611, 1 Int. Com. C. Rep. 208, as to land explorers or settlers; *Matter of U. S. Commissioners of Fish, etc.*, 1 Int. Com. Rep. 606; 1 Int. Com. C. Rep. 21; *Matter of Indian Supplies*, 1 Int. Com. Rep. 22, 1 Int. Com. C. Rep. 15, as to government property.

10. *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263.

11. *Ex parte Koehler*, 31 Fed. 315;

*Re Order of Railway Conductors*, 1 Int. Com. Rep. 18, 1 Int. Com. C. Rep. 8.

12. *Slater v. Northern Pac. R. Co.*, 2 Int. Com. Rep. 243, 2 Int. Com. C. Rep. 339.

13. *Re Boston, etc., R. Co.*, 3 Int. Com. Rep. 717, 5 Int. Com. C. Rep. 69.

14. *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 277, 43 Fed. 45; *Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co.*, 2 Int. Com. Rep. 729, 9 Int. Com. C. Rep. 465; *Associated Wholesale Grocers v. Missouri Pac. R. Co.*, 1 Int. Com. Rep. 393, 1 Int. Com. C. Rep. 156

fuel cars in times of car shortage to the bituminous coal mines along its line was delegated to the Interstate Commerce Commission by the Act to Regulate Commerce Feb. 4, 1887, as a means of prohibiting the unjust preferences or undue discriminations forbidden by section three of the act; and an order of the Commission commanding a railway company to desist from its practice not to take into account the company's fuel cars in the daily distribution of coal cars in times of car shortage to such coal mines, and requiring it for a future period of two years to count such cars against the share of the mine receiving them, is within the authority delegated by the amendment made to section 15 by the Act June 29, 1906, section four, upon complaint duly made, to declare a rate or practice affecting rates illegal, and to determine and prescribe for a term not exceeding two years what will be a just and reasonable rate, and what regulation or practice in respect to transportation is just, fair, and reasonable thereafter to be followed.<sup>15</sup> It is one of the primary purposes of the Interstate Commerce law to remove discriminations in rates; and under the broad powers conferred on the Interstate Commerce Commission "to execute and enforce the provisions of this act" and "to make an order that the carrier shall cease and desist from such violation to the extent to which the commission find the same to exist," by section 12 of the Act of Feb. 4, 1887, and section 15, as amended by Hepburn Act June 29, 1906, where it has found that discrimination exists against a shipper or commodity, it may prescribe a relative rate, as that the charge shall be the same as that for a similar service to other shippers or on another similar commodity, instead of fixing an absolute maximum

15. *Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 163, 54 L. Ed. —, rev'g *Chicago & A. R. Co. v. Interstate Commerce Commission*, 173 Fed. 930. The Court further held that such a requirement cannot be

said to destroy the freedom of contract, on the theory that any discrimination or preference resulting from such practice arose from the fact that the railway company chose to purchase coal for its fuel supply from a particular mine or mines.

rate, which would enable the carrier to continue the discrimination by reducing the rate to other shippers or on the other commodity.<sup>16</sup> The provision of section 15 of the Interstate Commerce law, as amended by the Hepburn Act, section four, that, where the commission shall find that a rate or any regulations or practices affecting rates are unjustly discriminating, it shall "determine and prescribe what will be the just and reasonable rate or rates; \* \* \* and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed," does not require the commission, on finding that a certain rate is discriminatory, to prescribe in detail regulations and practices which are not necessary to remove the discrimination, but which may become necessary for the protection of the carrier, and it may properly authorize or permit the carrier to make such regulations should the necessity arise.<sup>17</sup> An order of the Commission designed to remove a discrimination in rates is not invalid or inoperative because it does not go as far as it might, and fails to correct other discriminations found to exist.<sup>18</sup> The Commission, in inserting in an order commanding carriers to desist from a discrimination a condition for the carrier's benefit, cannot be said to have acted outside of its province, even though the subject matter of the condition be regarded as something subsequent to transportation.<sup>19</sup> Where an alleged unlawful discrimination in the distribution of coal cars in violation of section three had been practiced by defendant railroad company, resulting in injury to plaintiff, for which it was entitled to damages, such discrimination having been applicable to a class of shippers and not to complainant alone, the Interstate Commerce Commission had exclu-

16. *New York Cent., etc., R. Co. v. Interstate Commerce Commission*, 168 Fed. 131.

17. *New York Cent., etc., R. Co. v. Interstate Commerce Commission*, *supra*.

18. *New York Cent., etc., R. Co. v. Interstate Commerce Commission*, *supra*.

19. *New York Cent., etc., R. Co. v. Interstate Commerce Commission*, *supra*.



sive original jurisdiction to afford complainant relief, it not being entitled to sue in the first instance in an action for alleged damages sustained thereby, authorized by section 9, and this, though the acts constituting the alleged discrimination had ceased prior to the commencement of the suit.<sup>20</sup>

## § 28. Transportation of passengers.

Transportation of persons as well as of property is "commerce," and Congress may regulate their interstate transportation. The Act June 25, 1910, commonly known as the "white slave act," which forbids the inducing of a person to come into a State, with unlawful purpose by the inducer and in aid of such unlawful purpose, is not unconstitutional as an invasion of the police power of the State.<sup>21</sup> If the places from which and to which passengers are carried and the line over which they are carried are within the State, the commerce is domestic and subject to State control.<sup>22</sup> Transportation of freight and passengers from one State to another, or through more than one State, either by land or water, is interstate commerce.<sup>23</sup> The transportation of freights and passengers from State to State is interstate commerce, and the regula-

20. *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 176 Fed. 748.

21. *Bennett v. United States*, 194 Fed. 630; *United States v. Warner*, (C. C., N. Y.) 188 Fed. 682, Act Cong. June 25, 1910, making it a criminal offense for a person to transport, or assist or pay for transportation, from one state to another, of any woman for an immoral purpose, though apparently interfering with the police power of the state, is not unconstitutional; *United States v. Hoke*, 187 Fed. 992 (D. C., Tex.).

22. *Luken v. Lake Shore, etc., R. Co.*, 248 Ill. 377, 94 N. E. 175.

23. *U. S.—In re State Freight Tax*, 82 U. S. (15 Wall.) 232, 21 L. Ed.

146; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; *Sweat v. Boston, etc., R. Co.*, Fed. Cas. No. 13,684 (3 Cliff. 339); *Pullman Southern Car Co. v. Nolan*, (C. C.) 22 Fed. 76; *Mobile & O. R. Co. v. Sessions*, (C. C.) 28 Fed. 592. *Ind.—Fry v. State*, 63 Ind. 562, 30 Am. Rep. 238.

*N. J.—State v. Carrigan*, 39 N. J. Law (10 Vroom) 35.

*N. Y.—Steam Co. v. Livingston*, 3 Cow. 713.

*Tex.—Southern Pac. R. Co. v. Haas*, (Sup.) 17 S. W. 600; *American Starch Co. v. Bateman*, (Civ. App.) 22 S. W. 771.

tion thereof by the States is forbidden by the Federal constitution. Such commerce, whether carried on by individuals or corporations, is under the exclusive jurisdiction of Congress.<sup>24</sup> The transportation of goods and passengers by continuous carriage from one point in a State to another point in the same State is not interstate commerce, within the meaning of the Federal constitution, although for part of the route it is over the soil of another State; and therefore it is within the power of the State wherein it begins and ends to impose a tax on its gross receipt.<sup>25</sup> The State board of railroad commissioners has no power to regulate or interfere with the transportation of persons or merchandise by a steamship company between ports within the State, if they be in transit to or from other States, or when, in navigating the ocean, the vessel goes beyond a marine league from the shore. This power has been conferred upon Congress, and is exclusive.<sup>26</sup> The carrying of a pleasure party on a steamboat is not interstate commerce, although the boat may touch the shore of different States.<sup>27</sup> Having assumed control of interstate passenger traffic under its constitutional power, it must be presumed that Congress has prescribed all the regulations and penalties which it deemed proper to impose on such interstate traffic, and hence a State cannot impose additional statutory exactions and burdens.<sup>28</sup> A passenger was carried by three separate railroads from a point outside the State to a point within the State. He had separate transportation issued by the respective companies. The last railroad company carried him from points within the State. The passenger's baggage was checked through from the point of beginning to the point of destination. By what authority the agent of the initial carrier

24. *State of Indiana v. Pullman Palace-Car Co.*, (C. C.) 16 Fed. 193.

25. *Lehigh Val. R. Co. v. Pennsylvania*, 145 U. S. 192, 205, 12 Sup. Ct. 806, 809. 36 L. Ed. 672. aff'g 17 Atl. 179. 129 Pa. St. 303, 18 Atl. 125.

26. *Pacific Coast S. S. Co. v.*

*Board of Railroad Com'rs*, (C. C.) 18 Fed. 10.

27. *State v. Seagraves*, 111 Mo. App 353, 85 S. W. 925.

28. *Missouri, etc., R. Co. of Texas v. Fookes*, (Tex. Civ. App.) 40 S. W. 858.

so checked the baggage did not appear. It was held that the last railroad company was engaged in State commerce, and that the State statute expressly prohibited it from limiting its liability as a common carrier of the baggage.<sup>29</sup>

The personal preferences of many travelers for a southern route between eastern points and points on the Northern Pacific Railroad between Portland and Seattle do not make the through route via the Northern Pacific Railroad unreasonable and unsatisfactory, so as to justify the Interstate Commerce Commission in the exercise of its power under Act June 29, 1906, to establish through routes and joint rates where "no reasonable or satisfactory through route exists," in ordering the establishment of through routes and joint rates between those points via the Union Pacific Railway, so as to put the latter road on an equal footing with the Northern Pacific Railway Company in the use for through travel of the road belonging to the latter between Portland and Seattle.<sup>29a</sup>

## § 29. The commodities clause.—Construction and constitutionality.

Paragraph 5 of section 1 of the Interstate Commerce Act, which was inserted into the Act by the Hepburn Amendment of June 29, 1906, and which was not changed by the Mann-Elkins Amendatory Act of June 18, 1910, commonly known as the Commodities Clause, is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or

29. *White v. St. Louis S. W. R. Co. of Texas*, (Tex. Civ. App.) 86 S. W. 962.

29a. *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 30 Sup. Ct. 417, 54 L. Ed.

in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The constitutionality of this provision was questioned, and the United States Circuit Court held that the power of Congress under the commerce clause of the Constitution to regulate interstate commerce does not include the power to entirely exclude from such commerce an article or commodity which is a legitimate and useful subject of commerce, and not inimical to public safety, health, or morals, save when, and because, it is the property of a certain class of owners.<sup>30</sup> Upon an appeal of the cases in which this decision was made to the Supreme Court of the United States the judgments denying mandamus to compel certain railway carriers to refrain from interstate transportation of coal from the Pennsylvania anthracite region and the decrees dismissing bills in equity seeking to accomplish the same result by injunction were reversed and remanded for further proceedings. The Supreme Court made the following determinations in its interpretation of the meaning and effect of the clause:

1. In construing a statute reasonably susceptible of two interpretations, by one of which grave and doubtful constitutional

30. *United States v. Delaware & H. Co.*, 164 Fed. 215 (C. C., Pa. 1908).

The court held that the power of Congress under the commerce clause of the Constitution to regulate interstate and foreign commerce is limited by the other provisions of the Constitution, and among them that of the fifth amendment, that no person shall be deprived of life, liberty, or property without due process of law; and the validity of a statute enacted in the assumed exercise of such power may be challenged on the ground that it is in violation of such provisions.

That the "commodities clause" is not a regulation of interstate com-

merce, within the commerce clause of the Constitution, but entirely excludes from such commerce a certain class of persons, and is unconstitutional and void as applied to railroad companies which, under the sanction and encouragement of state laws, had more than 50 years before its enactment become the owners of coal lands in such state, and by themselves, or subsidiary companies of which they owned the stock, developed mines thereon, and constructed railroad lines thereto at great expense, and engaged extensively in the mining of coal, a large part of which was necessarily marketed in other states, and which could

questions arise, and by the other of which such questions are avoided, it is the court's duty to adopt the latter interpretation.

2. The dissociation of railway companies prior to transportation from the articles or commodities transported, whether such association results from manufacture, mining, production, or ownership, or interest, direct or indirect, is the common purpose of the provisions of the Hepburn Act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

3. Transportation when the thing to be transported has been manufactured, mined or produced by the carrier or under its authority, and at the time of transportation the carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the thing to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, is all that is forbidden by the provisions of the Hepburn Act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

not practically be transported, except over their own lines, nor marketed within the state, as depriving such companies of their liberty and property without due process of law, in violation of the fifth constitutional amendment.

That the power to regulate interstate commerce is a distinct and substantive power granted to Congress by the Constitution, subject to limitations thereof and is not the equivalent

of the reserve police powers of the states, which must always remain indefinite in character and incapable of classification or definition; but an enactment in the assumed exercise of such power, like one by a state under its police powers, is reviewable by the courts to determine whether it is within the power granted as so limited by the Constitution itself, and a legitimate and reasonable exercise thereof.

4. The ownership by a railway carrier of stock in a *bona fide* corporation manufacturing, mining, producing, or owning the commodity carried is not the "interest, direct or indirect," in such commodity, forbidden to the carrier by the Hepburn Act of June 29, 1906, but such words are to be taken as embracing only a legal or equitable interest in the commodities to which they refer.

5. Congress could properly enact, as a regulation of commerce, so much of the Hepburn Act of June 29, 1906, as forbids a railway carrier from transporting articles or commodities in interstate commerce when such article or commodity has been manufactured, mined, or produced by the carrier, or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, although, by existing State legislation, such carrier may have a lawful right of ownership of or association with the articles or commodities upon which these provisions operate.

6. Railway companies enjoying the right, under existing State legislation, of ownership of or association with the articles or commodities carried, are not denied the due process of law guaranteed by U. S. Const., Fifth Amendment, by so much of the provisions of the Hepburn Act of June 29, 1906, as forbids a railway carrier from transporting articles or commodities in interstate commerce when such article or commodity has been manufactured, mined, or produced by the carrier or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense.

7. The exception in favor of timber and manufactured products thereof, contained in the provisions of the Hepburn Act of June 29, 1906, forbidding railway carriers from transporting in interstate commerce articles or commodities with which they are associated, or in which they are interested, does not render the statute invalid for discrimination.

8. The Federal Supreme Court will not consider the question of the constitutionality of the clause of the Hepburn Act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated or in which they are interested, in an action seeking to enforce such provisions by injunction or mandamus, in which no recovery of penalties is sought.

9. The possible invalidity of the clause of the Hepburn Act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated, or in which they are interested cannot affect the validity of these provisions, since the penalty clause is wholly separable therefrom.

10. The Delaware & Hudson Company, chartered to secure coal lands and mine coal, and to construct a canal and railroad for the purpose of transporting the products of its mines, being also engaged as a carrier by rail in the transportation of coal in the channels of interstate commerce, is a "railroad company" within the meaning of the Hepburn Act of June 29, 1906, prohibiting such companies from transporting in interstate commerce commodities with which they are associated, or in which they are interested.<sup>31</sup>

31. United States v. Delaware & H. Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836, revg. judg. (C. C. Pa., 1908) 164 Fed. 215.

Mr. Justice Harlan, in a dissenting opinion, said: "In my judgment

the Act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if

Prior to the amendment of 1906, inserting this express provision as to commodities, the Supreme Court had held that an interstate carrier not empowered by its charter or by any legislation existing at the time of the adoption of the Act to regulate commerce to mine and market coal violates the mandate of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discriminations, by stipulating to sell and transport coal at an agreed price, insufficient to yield its published freight rates after deducting the cost of purchase and delivery. That deliveries of coal by such an interstate carrier, under a contract to sell and transport such coal at a stipulated price, come within the requirement respecting the maintenance of published rates and its prohibitions against undue preferences and discrimination whenever, from any cause, the gross sum realized is insufficient to yield the carrier its published freight rates after deducting the purchase price of the coal and the cost of delivery, although the contract may not have been open to that objection when made. The court further held that the prohibitions of the Act to Regulate Commerce as to rebates, favoritism, and discrimination having been construed by the Interstate Commerce Commission, charged with its execution, to be inapplicable to the freight rates for coal charged by interstate carriers empowered to mine and market coal by their charters or by legislation existing at the time of the adoption of that Act,<sup>32</sup>

it owns a majority or all the stock—in the company which mined, manufactured, or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the Act will enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to

prevent the transporting company from doing injustice to other owners of coal.”

32. *Coxe Bros. v. Lehigh Valley R. Co.*, 3 Int. Com. Rep. 460, 4 I. C. C. Rep. 535 (1891); *Haddock v. Delaware, etc., R. Co.*, 3 Int. Com. Rep. 302, 4 I. C. C. Rep. 296 (1890), the Commission held that under such circumstances its authority was confined to compelling the exaction of rates which were just and reasonable.



this construction, which had long obtained in practical execution, and had been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, must be treated as read into the statute and must be applied to all strictly identical cases in the future; at least, until Congress had legislated on the subject.<sup>33</sup>

The Supreme Court, in holding the last mentioned proposition, called attention to the distinction between these rulings of the Commission and its decision in a later case<sup>34</sup> that a carrier was without power to purchase a commodity for the purpose of securing the right to transport it, and thus evade the law which would have applied to its transportation had it been owned by any other party, and quoted the following language of the Commission in distinguishing the latter case from the former cases: "Those cases are in no respect similar to this. In both the common carrier was also owner of extensive coal fields, and indeed it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the Act, and had no reference to the Act. Unless the carrier was permitted to transport its coal, the result would be in effect the confiscation of its property; and to order it to charge itself with a particular rate would merely result in a matter of bookkeeping. Under these circumstances it was held that the only remedy was to inquire whether the rate charged the complainant was a reasonable one." But the Supreme Court was content, it seems, to decide no more than that the carrier must charge itself in its operations as a dealer with its own schedule rates as carrier, without at all intimating that, as an original question, it would concur in the view expressed in the case last cited, that to have

33. *New York, etc., R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515, 1906; *Interstate Commerce Commission v. Chesapeake & O. Ry. Co.*,

200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515.

34. *Re Alleged Unlawful Rates*, 7 Int. Com. Rep. 33, 7 I. C. C. Rep. 33.

applied the Act to Regulate Commerce, under proper rules and regulations for the segregation of the business of producing, selling, and transporting, as presented in the Haddock and Coxe Bros. cases, would have been confiscatory.<sup>35</sup>

The provision of the Hepburn Act June 29, 1906, that after May 1, 1908, it shall be unlawful for a railroad company to transport from State to State any commodity mined or produced by it or in which it may have an interest, applies to a railroad having termini in different States and transporting coal thereon from mines, the capital stock of which is owned by the railroad company, though all the coal mined by said railroad company is sold at the mine and title is passed before the coal is transported to another State.<sup>36</sup> The exercise by a railway carrier of its power as a stockholder in a corporation manufacturing, mining, producing, or owning the commodity carried in such manner as to deprive the latter corporation of all independent existence, and to make it virtually but an agency, or dependency, or department of the carrier, is forbidden by the provisions of Hepburn Act June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect."<sup>37</sup>

### § 30. Switching privileges.—Construction of the Act.

A railroad company, as a carrier, was not bound, at common law, by the establishment and maintenance for any length of time of a switch connection of its main line with a private warehouse, forever to maintain it, but it might be discontinued or removed

35. *New York, etc., R. Co. v. Interstate Commerce Commission.* *supra.* Rep. (N. Y.) 195, 101 N. Y. Supp. 837.

36. *Central Trust Co. of New York v. Pittsburg, etc., R. Co.*, 52 Misc. 37. *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. —.

in the same manner as a public station,—especially where its situation is such as to occasion possible or probable danger to the public using the road.<sup>38</sup> A railroad company might at pleasure remove switch or spur tracks built by it to bring business to its road, in the absence of an express contract to continue the tracks for a given time, and neither the railroad company nor its receiver, in the absence of an express contract, could be compelled to maintain and operate a switch or spur from its line for the use of private parties in the shipment of their products at a loss, or when its operation could not be rendered safe without a considerable expenditure of money.<sup>39</sup> The duty of providing switching privileges was placed upon railroads in England in 1904,<sup>40</sup> and was imposed in the United States by the provision of the Act of June 29, 1906, quoted in the last preceding section, amending the Interstate Commerce Act. Under the original act a railroad was not bound to provide and maintain a spur track to the premises of a shipper, but a common carrier of interstate freight could not lawfully deny switch connections and service to one person, place, locality or kind of traffic which it afforded to others similarly situated,<sup>41</sup> and the Commission could order it to cease a preference in giving a switch to one and denying it to a competitor similarly situated.<sup>42</sup> The provision of the amended act of June 29, 1906, relating to switch connections with lateral branch roads, the Commission held, does not grant plenary discretion to the Commission as to the advisability of such connection. The act declares that the connection shall be made under certain specified circumstances and conditions. Under the first clause of this pro-

38. *Jones v. Newport News, etc., Co.*, 65 Fed. 736, 13 C. C. A. 95, 31 U. S. App. 92, 61 Am. & Eng. R. Cas. 294 (1895).

39. *Mercantile Trust Co. v. Columbus, etc., R. Co.*, 90 Fed. 148 (1898).

40. 4 Edw. 7, c. 19.

41. *Interstate Stock-Yards Co. v. Indianapolis U. R. Co.*, 99 Fed. 481.

42. *Red Rock Fuel Co. v. Baltimore & O. R. Co.*, 11 I. C. C. Rep. 438, 11 Int. Com. Rep. 438 (1905); *Mt. Vernon Milling Co. v. Chicago, etc., R. Co.*, 7 I. C. C. Rep. 194, 7 Int. Com. Rep. 194 (1897).

vision it has become the duty of an interstate carrier to make connection with a lateral branch road, either upon the application of that lateral line or of any shipper, upon three conditions: (1) That such switch connection shall be reasonably practicable; (2) that it can be put in with safety, and (3) that it will furnish sufficient business to justify the construction and maintenance of such switch connection. It is not contemplated by the law that appeal to the Commission shall be necessary; but it is provided that in case a carrier does not comply with the duty imposed complaint may be made by a shipper to the Commission, which shall have authority to make an order compelling the connection.<sup>43</sup> Prior to the enactment of this amendment the Commission was not empowered to order such switch connections; that amendment specifically requires complainants to make written application upon the carrier for the desired switch connections.<sup>44</sup> The remedy given by the Act June 29, 1906, § 1, on complaint by the shipper to the Interstate Commerce Commission when an interstate railway carrier refuses to establish a switch connection with a lateral branch line, is exclusive, and the general powers given by other sections of the statute cannot be deemed to authorize a complaint to the Commission by the lateral, branch railway company.<sup>45</sup> The amendment of June 18, 1910, provides for a complaint by the owner of such lateral, branch line as well as by the shipper, clearly indicating that this omission in the Act of 1906 was an oversight.

### § 31. Discrimination as to switch connections.

Under the Interstate Commerce Act a common carrier of inter-

43. *Rahway Valley R. Co. v. Delaware, etc.*, R. Co., 14 I. C. C. Rep. 191 (1908); *McCormick v. Chicago, etc.*, R. Co., 14 I. C. C. Rep. 611 (1908).

44. *Barden & Swarthout v. Lehigh Valley R. Co.*, 12 I. C. C. Rep. 193.

45. *Interstate Commerce Commission v. Delaware, etc.*, R. Co., 216 U. S. 536, 30 Sup. Ct. 415, 54 L. Ed. —, *aff'g Delaware, etc.*, R. Co. v. Interstate Commerce Commission, 166 Fed. 498.

state freight cannot lawfully deny switch connections or service to one person, place, locality, or kind of traffic which it affords to others similarly situated; and one who has built a switch connection with the track of a railroad, with the consent of the company, has an implied right to service at such switch, and, unless such service is limited, either expressly or by implication, he may lawfully insist that the carrier there receive and deliver all such freight as it customarily carries, and for the receipt and delivery of which the switch is suitable and convenient.<sup>46</sup> But the difference between the business of persons receiving and shipping dead freight over a spur track upon which their premises abut, and that of a company whose premises are 40 feet away from the track, and which seeks to receive and ship live stock, is so great that it is not unjust discrimination to refuse to furnish the same facilities to the latter as to the former.<sup>47</sup> A railroad company is under no legal obligation to construct a spur track from its line to a coal mine for the private benefit of the owner in shipping his product; nor can it be held liable in damages for unlawful discrimination because of its refusal to build such track, although it had permitted to be built, and assisted in building, similar tracks to other mines.<sup>48</sup> The provisions of Interstate Commerce Act Feb. 4, 1887, § 3, making it unlawful for any common carrier engaged in interstate commerce to give any undue or unreasonable preference or advantage to any particular shipper, or to subject any particular shipper to any undue or unreasonable prejudice or disadvantage in any respect whatever, if construed to apply to the affording of facilities for shipments, do not subject a railroad company to indictment under section ten of the act for

46. *Interstate Stock-Yards Co. v. Indianapolis U. Ry. Co.*, 99 Fed. 472 (C. C. 1900).

47. *Butchers', etc., Co. v. Louisville & N. R. Co.*, 67 Fed. 35. 14 C. C. A. 290, 31 U. S. App. 252 (1895).

48. *Harp v. Choctaw, etc., R. Co.*, 118 Fed. 169 (C. C. 1902), *aff'd* 125 Fed. 445, 61 C. C. A. 405 (C. C. A. 1903).

its failure or refusal to furnish switch connections to a shipper tendering interstate traffic for transportation, although such connections are furnished to other shippers, where the indictment does not charge that those demanded are reasonably practicable and could be put in with safety and would furnish sufficient business to justify the expense of their construction and maintenance, nor that the person or company asking for the same offered to pay such portion of their cost as is usual and reasonable.<sup>49</sup> The Commission held, prior to the amendment of 1906 imposing upon carriers the duty of providing switching privileges to shippers, that, while the Commission had no authority to order a carrier to put in side track or switch connections, or to prescribe the terms or conditions relating to the construction of such connections, its jurisdiction did extend to any case of wrongful prejudice resulting from discrimination in the provision of such facilities or instrumentalities of shipment or carriage, including side-track or switch connections; that every person or company desiring a side track or switch connection was not entitled to demand it because such connections had been granted to others, but where there was similarity of situation and feasibility of connection such as would permit practical adherence to reasonable operating conditions by the carrier, switching facilities granted to one shipper must be granted to all shippers, and a refusal to do so constituted unjust discrimination.<sup>50</sup>

A contract between two railroad companies providing for the construction of a spur track to a customer and the switching of

49. *United States v. Baltimore & O. R. Co.*, 153 Fed. 997 (D. C. 1907).

50. *Red Rock Fuel Co. v. Baltimore & O. R. Co.*, 11 Int. Com. Rep. 438, 11 I. C. C. Rep. 438 (1905).

See also *Mount Vernon Milling Co. v. Chicago, etc., R. Co.*, 7 Int. Com. Rep. 194, 7 I. C. C. Rep. 194, holding

that a railroad company's failure or refusal to provide at its own cost and thereafter maintain a spur or side track from its main line for one shipper was not shown to be an unjust discrimination and a violation of § 3 by evidence as to provision and maintenance of side tracks for other shippers partly at their own expense.

cars over the same for a specified charge does not violate the interstate commerce law, unless it contemplates some discrimination against other customers seeking or enjoying like privileges.<sup>51</sup>

**§ 32. Power of the commission to fix rates under amendments of 1906 and 1910.**

Power to determine and prescribe what are just and reasonable maximum rates to be charged by any common carrier engaged in interstate commerce is in a limited way conferred on the Interstate Commerce Commission by section 15 of the Interstate Commerce Act, as amended by Act June 29, 1906, § 4; but as the Commission acts only as a legislative or administrative board, and not judicially, its determination or action does not and cannot preclude judicial inquiry into the justness and reasonableness of the rates within the constitutional guaranty.<sup>52</sup> Neither Congress nor any legislative or administrative board acting by its authorization can competently establish rates for the transportation of property in interstate commerce that will not admit of the carrier earning such compensation for the service rendered as under all the circumstances is just and reasonable, since such action would deprive it of its property without due process of law, and would be a taking of its property for public use without just compensation, in violation of the fifth amendment to the Constitution.<sup>53</sup> The rates prescribed by the Interstate Commerce Commission under the statute are not only required to be just and reasonable within the constitutional guaranty, but they must also not be unjustly discriminatory nor unduly preferential.<sup>54</sup> Maximum rates prescribed by the Interstate Commerce Commission, to be just and reasonable within the constitutional limitation, must have rea-

51. Cedar Rapids & I. C. Ry. & L. Co. v. Chicago, etc., Ry. Co., 145 Iowa, 528, 124 N. W. 323.

52. Missouri, etc., R. Co. v. Interstate Commerce Commission, 164 Fed. 645.

53. Missouri, etc., R. Co. v. Interstate Commerce Commission, 164 Fed. 645.

54. Missouri, etc., R. Co. v. Interstate Commerce Commission, 164 Fed. 645.

sonable regard for the cost to the carrier of the service rendered and the value of the property employed therein, and also reasonable regard for the value of the service to the public; and where the cost to the carrier is not kept within reasonable limits, or for any reason its business cannot reasonably be so conducted as to render it profitable, the misfortune must fall upon the carrier.<sup>55</sup>

The authority granted to the Interstate Commerce Commission by § 15 of the Interstate Commerce Act, as amended by Act June 29, 1906, § 4, to prescribe just and reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable, is not an absolute or arbitrary power to act on any considerations which the Commission may deem best for the public, the shipper, and the carrier, but its orders must be based on transportation considerations, and, while it may give weight to all factors bearing on either the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely.<sup>56</sup> In determining the reasonableness of a freight rate between specified points, the Interstate Commerce Commission is not limited to the requirements of a particular carrier or to the question whether a lesser rate would be remunerative to a particular carrier, but should, in addition, consider the rates in the particular territory

55. *Missouri, etc., R. Co. v. Interstate Commerce Commission*, 164 Fed. 645.

56. *Atchison, etc., R. Co. v. Interstate Commerce Commission* (U. S. Com. Ct.), 190 Fed. 581, wherein an order of the Interstate Commerce Commission reducing the blanket rate

charged by railroad companies for the carriage of lemons was held void as beyond the powers of the Commission, because based primarily on the assumed authority to protect the lemon industry against foreign competition, and not on traffic considerations.



to be affected by a change of a rate or rates in question.<sup>57</sup> The Commission in prescribing maximum rates should base its opinion upon facts and circumstances disclosed at the hearing, or otherwise entitled to consideration, of sufficient weight and force to appeal to the understanding and conscience of intelligent men, and the experience of the Commission, as well as numerous decisions of the courts, have established precedents and standards by which the Commission ought to be guided and aided in reaching a just and reasonable conclusion.<sup>58</sup>

The power given to the Interstate Commerce Commission to determine rates by Interstate Commerce Act, Feb. 4, 1887, § 15, as amended by Hepburn Act, June 29, 1906, § 4, does not deprive a federal court of equity of jurisdiction to enjoin the putting into effect of an interstate rate which is shown to be unreasonable and in restraint of interstate commerce, until such rate can be passed on by the commission, and an injunction is necessary to prevent irreparable injury.<sup>59</sup> Under the provision or section 15 of the Interstate Commerce Act, Feb. 4, 1887, as amended by the Hepburn Act, June 29, 1906, § 4, that "all orders of the commission except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission" unless suspended or set aside, etc., an order relating to rates is not invalid because it fails to prescribe the time it shall remain in force, but in such case

57. *Hooker v. Interstate Commerce Commission*, 188 Fed. 242 (U. S. Com. Ct.); *Eagle White Lead Co. v. Interstate Commerce Commission*, 188 Fed. 256 (U. S. Com. Ct.).

58. *National Petroleum Assoc. v. Ann Arbor R. Co.*, 14 I. C. C. Rep. 272, wherein the commission dismissed an omnibus complaint asking the reduction of thousands of rates concerning which no specific com-

plaint had been made, on the ground that if the alleged specific discriminations are in violation of the law they should be brought to the attention of the Commission in a proceeding directed against the carrier responsible therefor.

59. *Macon Grocery Co. v. Atlantic C. L. R. Co.*, 163 Fed. 738, decree rev'd. *Atlantic C. L. R. Co. v. Macon Grocery Co.*, 166 Fed. 206.

the order remains in force for two years, the maximum time prescribed by the statute. The commission should, however, comply with the implied requirement of the statute and in all cases fix the time.<sup>60</sup> Where an interstate carrier charged plaintiff the regular posted tariff rates, plaintiff could not maintain an action at law either under the Anti-Trust Act, Act July 2, 1890, or the Interstate Commerce Act, Feb. 4, 1887, for a readjustment of such rates on the ground that the same were unreasonable or unlawful, its remedy being by application to the Interstate Commerce Commission to have the schedule of tariffs adjusted on a reasonable and lawful basis.<sup>61</sup> An order of the Interstate Commerce Commission classifying and fixing rates on lumber from Willamette Valley points in Oregon to San Francisco was reasonable and not invalid, because in allowing a lower rate on rough fir and lath than on higher grades the Commission considered the fact that without such rate such grades could not be shipped in competition with points having water transportation.<sup>62</sup> The oversea extension of the Florida East Coast Railway from Homestead to Key West cannot properly be considered a part of the main line, for the purpose of determining whether rates established by the Interstate Commerce Commission from points east of Homestead are remunerative or confiscatory.<sup>63</sup>

### § 33. Carriage of particular articles.

The Act June 29, 1906, Chap. 3594, prohibiting railroad companies transporting live stock on interstate shipments from keeping the same confined in cars continuously for more than 28 hours without unloading the same for feed, water, and rest, is to be strictly construed, and a railroad company, which receives live stock from a connecting carrier after it has already been continuously

60. *New York Cent., etc., R. Co. v. Interstate Commerce Commission*, 168 Fed. 131.

61. *American Union Coal Co. v. Pennsylvania R. Co.*, 159 Fed. 278.

62. *Southern Pac. Co. v. United States*, 197 Fed. 167 (U. S. Com. Ct.)

63. *Florida East Coast Ry. Co. v. United States*, 200 Fed. 797.

confined in cars for more than 28 hours and allows several more hours to pass before unloading the same, is *prima facie* guilty of a violation of the statute.<sup>64</sup> A railroad company which delivers the cars containing such stock to a connecting carrier or to the consignee within the prescribed time is relieved from further responsibility.<sup>65</sup> An "accidental or unavoidable cause which cannot be anticipated or avoided by the exercise of due diligence and foresight," and which will legally excuse an interstate carrier of live stock for confining such stock in cars for a period longer than 28 consecutive hours without unloading for rest, water, and feeding, under this act, is one which cannot be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case, and as would have been exercised by a man of ordinary prudence under such circumstances. An accident occurring to the train through the negligence of the transportation company is not such a cause; nor is mere press of business, or the sidetracking of the train to allow for the passing of other trains, the meeting or passing of which could have been anticipated when the transportation was begun, or the lack of facilities for unloading or feeding.<sup>66</sup> A freight train may be regarded as a passenger train, within the meaning of Rev. St. § 5353, prohibiting the transportation of nitroglycerin on vehicles engaged in interstate passenger traffic, when passengers are conveyed thereby for compensation, in any kind of cars, by authority of the railway company.<sup>67</sup> The prohibition against transporting nitroglycerin extends also to dynamite, which is made by mixing nitroglycerin with some solid and inert absorbent substance, and contains no other explosive ingredient.<sup>68</sup>

64. United States v. New York Cent., etc. R. Co., 156 Fed. 249.

65. United States v. Southern Pac. Co., 157 Fed. 459.

66. United States v. Southern Pac. Co., 157 Fed. 459.

67. United States v. Saul, 58 Fed. 763.

68. United States v. Saul, 58 Fed. 763.

§ 34. Enforcement of the act.—Judicial proceedings to enforce regulations.

Section nine of the Interstate Commerce Act gives persons claiming to be damaged by a violation of the provisions of the act an election to sue in the courts of the United States, or to seek redress by proceedings before the Interstate Commerce Commission. But both remedies cannot be pursued.<sup>69</sup> The remedies provided by the act are exclusive, and a party seeking damages for a violation of the act cannot bring action in a State court, such court having no jurisdiction.<sup>70</sup> The procedure before the commission is provided for by the act. It has been conclusively determined by the courts that the Interstate Commerce Commission has no power to fix rates for the carriage of interstate freight, and a decree of a court for the enforcement of a rate so fixed by the commission is without authority nor has the court itself the power to determine in advance what is a reasonable rate, and to enjoin the future observance of such rate, such power being legislative, and not judicial in its character.<sup>71</sup> In a suit to enforce its orders the Interstate Commerce Commission represents the public, and its right to relief is not affected by the fact that the complainants before it may themselves have participated in practices which were unlawful.<sup>72</sup> The special remedies afforded by the act to prevent the imposition of unjust and unreasonable rates were intended to supplement, and not to supplant, the existing remedies furnished by the common law.<sup>73</sup> Under its general chancery jurisdiction, a court of equity has power to remedy wrongs consisting of the violation by a carrier of the provisions of the interstate

69. *Interstate Commerce Com. v. Louisville, etc., R. Co.*, 73 Fed. 409; *Copp v. Louisville, etc., R. Co.*, 43 La-Ann. 511, 26 Am. St. Rep. 198.

70. *Copp v. Louisville, etc., R. Co.*, *supra*. See *Murray v. Chicago, etc., R. Co.*, 62 Fed. 24, 4 Int. Com. Rep. 806.

71. *Southern Pac. R. Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 779, 42 C. C. A. 12.

72. *Interstate Commerce Com. v. Southern Pac. Co.*, 132 Fed. 829.

73. *Tift v. Southern Ry. Co.*, 123 Fed. 789.

commerce law prohibiting discrimination between shippers.<sup>74</sup> In determining whether the rates charged by a railroad company to and from a city are unjust and unreasonable in themselves, the greatest weight should be given to the opinions of expert witnesses, the effect of the rates charged on the growth and prosperity of the city, the cost of transportation as compared with the rates charged, and the rates in force at numerous other cities, where the circumstances are as nearly similar as may be to those prevailing at such city.<sup>75</sup> While it may be true that traffic managers are better able, by reason of their knowledge and experience, than the courts to fix rates and decide what discriminations are justified by the circumstances, yet this cannot be considered, so far as it relates to the Interstate Commerce Commission, which, by reason of the experience of its members in this kind of controversy, and their opportunity for full information, is, in a sense, an expert tribunal. The courts, moreover, are continually called upon to review the work of experts in all branches of business and science, and the intention of Congress that they should revise the work of railway-traffic experts, whether railway managers or commerce commissioners, is too clear to admit of dispute.<sup>76</sup>

The Elkins Act, Feb. 19, 1903, § 3, authorizes a suit in equity by the United States to restrain a violation of the act by discrimination or the giving of rebates only against a common carrier, subject to its provisions.<sup>77</sup> A suit under Interstate Commerce Act, Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, for a

74. *United States v. Michigan Cent. R. Co.*, 122 Fed. 544. The Elkins Act of 1903 extending the equity jurisdiction of the United States applies to every violation of the Interstate Commerce Act, whether previously or subsequently to the enactment of the former. *Id.* See also *Missouri Pac. R. Co. v. United States*, 189 U. S. 274.

75. *Interstate Commerce Com. v. Southern Ry. Co.*, 122 Fed. 800, 117 Fed. 74; *Interstate Commerce Com. v. Louisville & N. R. Co.*, 118 Fed. 613.

76. *East Tennessee, etc., R. Co. v. Interstate Commerce Com.*, 99 Fed. 52, 39 C. C. A. 413.

77. *United States v. Union Storage & Transit Co.*, 192 Fed. 330 (U. S. Com. Ct.)

maudamus to compel a common carrier to make annual reports to the Interstate Commerce Commission, can be maintained only after such report has been demanded and refused.<sup>78</sup> The Commerce Court may enjoin the performance of a contract offending provisions of Interstate Commerce Act, Feb. 4, 1887, § 6, and Act June 29, 1906, intended to prevent undue advantage or unlawful discrimination.<sup>79</sup> Except as to those things which the Interstate Commerce Commission has defined and denounced as undue discrimination, a discrimination complained of may be dealt with by the State courts according to their own statute or the common law.<sup>80</sup> On review of an order of the Interstate Commerce Commission requiring the reduction of a particular rate by a railroad company, there is no presumption in favor of the reasonableness of the many other rates in force, which were not under direct investigation, that will overthrow substantial evidence that the rate in question was unreasonable.<sup>81</sup> A suit to compel an interstate carrier to receive and transport goods tendered to it for shipment, which it wholly refuses to do, is one to compel the performance of a duty imposed on it by law, and within the jurisdiction of the courts; and complainant is not required to resort in the first instance to the Interstate Commerce Commission.<sup>82</sup> A shipper cannot maintain an action against a common carrier to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment, without reference to any previous action by the Interstate Commerce Commission, where such rate has been filed

78. *United States v. Union Stock-yard & Transit Co.*, *supra*.

79. *United States v. Union Stock-yard & Transit Co. of Chicago*, 226 U. S. 286. 33 Sup. Ct. 83, 57 L. Ed. —, modfg. judg. (Com. Ct.) 192 Fed. 330.

80. *Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 237 Pa. 420, 85 Atl. 426.

81. *Lehigh Valley R. Co. v. United*

*States*, 204 Fed. 986 (U. S. Com. Ct.), also holding a petition by a railroad company not to allege grounds for setting aside an order of the Interstate Commerce Commission fixing rates on coal to a particular terminal as confiscatory, nor because not sustained by substantial evidence.

82. *Danciger v. Wells, Fargo & Co.*, 154 Fed. 379.

with that Commission and promulgated as provided by the Act to Regulate Commerce, and is the rate which it is the duty of the carrier, under that act, to enforce against shippers until changed in accordance with the provisions of that statute, since the independent right of an individual originally to maintain actions to obtain pecuniary redress for violations of the act, conferred by Act Feb. 4, 1887, § 9, must be confined to such wrongs as can, consistently with the context of the act, be redressed without previous action by the Commission, and the provision of section 22, that nothing therein "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," cannot be construed as continuing in shippers a common-law right the continued existence of which would be absolutely inconsistent with the provisions of the statute.<sup>83</sup> A shipper, seeking relief from unreasonable rates established for interstate commerce, is required by Interstate Commerce Act, Feb. 4, 1887, to primarily invoke redress through the Interstate Commerce Commission, which is vested with exclusive original jurisdiction to determine the reasonableness of rates fixed in an established schedule;<sup>84</sup> and until a schedule of rates, filed and published by a common carrier, pursuant to the Act Feb. 4, 1887, and the several acts amendatory thereof, has been declared excessive and unreasonable by the Commission, a shipper cannot maintain an action for the excess of freight exacted on interstate shipments, if the rates charged were those fixed by the schedule.<sup>85</sup>

Under Interstate Commerce Act, Feb. 4, 1887. §§ 13, 15, au-

83. *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, revg. judg. *Abilene Cotton Oil Co. v. Texas & P. Ry. Co.* (Tex. Civ. App.), 85 S. W. 1058.

84. *Baltimore & O. R. Co. v. La Due*, 112 N. Y. Supp. 964, 128 App. Div. 594, revg. judg. 57 Misc. Rep.

614, 108 N. Y. Supp. 659; *Atchison, etc., Ry. Co. v. Superior Refining Co.*, 83 Kan. 732, 112 Pac. 604; *L. Starks Co. v. Grand Rapids & I. Ry. Co.*, — (Mich.) —, 18 Detroit Leg. N. 341, 131 N. W. 143.

85. *Robinson v. Baltimore & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323.

thorizing complaints to the Interstate Commerce Commission against unjust freight rates fixed by a carrier, and under section 16, authorizing awards of damages by the Commission, and empowering the federal Circuit Court to enforce the Commission's orders by injunction or other proper process, the Circuit Court has no jurisdiction of a suit to enjoin an advance in freight rates on a commodity pursuant to a conspiracy to discriminate against complaints, though section 9 provides that one claiming to be damaged by a carrier may elect to complain to the Commission or sue in the federal courts, though section 22 provides that the act shall not alter existing remedies, and though section 23 gives the Circuit and District Courts jurisdiction in case of violations by carriers of certain provisions of the act to issue mandamus to compel conformity.<sup>86</sup>

Under section 22 of the Interstate Commerce Act, Feb. 4, 1887, which expressly preserves all legal remedies, a Circuit Court of the United States has jurisdiction of a suit to enjoin railroad companies from filing or enforcing a proposed new schedule of rates alleged to be unjust and unreasonable pending a determination of their reasonableness by the Interstate Commerce Commission, where it is shown that their enforcement would result in irreparable injury to complainants.<sup>87</sup> Where complainants, having established a rate for lemons from California to points between the Rocky Mountains and the Atlantic coast of \$1.15 per hundred-weight in car load lots, the Interstate Commerce Commission passed an order, to become effective November 1, 1910, prescribing

86. *Wickwire Steel Co. v. New York Cent., etc., R. Co.*, 181 Fed. 316.

Under Interstate Commerce Act Feb. 4, 1887, § 6, requiring carriers to file freight rate schedules with the Interstate Commerce Commission and to post them in railway stations, and providing that changes in rates shall not take effect until after 30 days' notice to the commission and

to the public in the same way, a rate filed with the commission is put in force, though not so posted, as affecting the Circuit Court's jurisdiction to enjoin it. *Id.*

87. *Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs. Assn.*, 165 Fed. 1; *Union Pacific R. Co. v. Oregon & Washington Lumber Mfrs. Assn.*, 165 Fed. 13.



a rate of not to exceed \$1 per hundredweight, and complainant railroad companies, claiming that such rate had not been adjusted according to the cost and value of the service, and that the Commission could not lawfully prescribe a single blanket rate to points so widely separated, also that the rate was unjust and unreasonable, and so low that the traffic was not compensatory, applied for an injunction restraining the enforcement thereof until its validity could be finally determined, it was held that, the validity of such rate being subject to grave and serious doubt, an interlocutory injunction will be granted until the case can be determined by the Commerce Court created by Act Cong. June 18, 1910, c. 310, 36 Stat. 539.<sup>88</sup> Under the Elkins Act, Feb. 19, 1903, § 3, prohibiting rebates by carriers, providing for actions by the Interstate Commerce Commission after investigation, and declaring that it shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, the Attorney General has authority to institute a proceeding to restrain rebating by interstate carriers of his own motion, without direction or investigation on the part of the Interstate Commerce Commission.<sup>89</sup>

88. *Atchison, etc., Ry. Co. v. Interstate Commerce Commission*, 182 Fed. 189.

89. *United States v. Milwaukee Refrigerator Transit Co.*, 145 Fed. 1007.

Where a proceeding to restrain certain carriers and shippers from giving and receiving rebates on interstate shipments was instituted at the direction of the Attorney General, who retained special counsel nominated by the informing witness, and defendants made no application for

a stay of proceedings in order to object to the appearance of such special counsel, they were not entitled to a dismissal on the ground that the prosecutor had agreed with the Attorney General to bear a deficiency in the expense of the prosecution after applying the balance of the Attorney General's appropriation applicable to that purpose. *Id.*

*U. S.—Illinois Cent. R. Co. v. S. Segari & Co.*, 205 Fed. 998.

*Ga.—Georgia R. Co. v. Creety*, 5 Ga. App. 424, 63 S. E. 528.

### § 35. Contracts in violation of regulations.

A contract for the transportation of an interstate shipment at a less rate than that established under a schedule filed pursuant to Interstate Commerce Act, § 6, is void, and hence does not estop the carrier from recovering the freight due on account of the undercharges.<sup>90</sup> A shipper is properly required to pay the full freight rate, established under the Interstate Commerce Law, though the carrier has through mistake contracted at a lesser rate.<sup>91</sup> A contract with a carrier to supply an interstate shipper a specified number of cars on certain dates is not a violation of Interstate Commerce Act, § 3, unless the contract, if performed, will extend to that shipper an undue preference over other shippers.<sup>92</sup> Tariffs on sugar, filed with the Interstate Commerce Commission, providing for an allowance for cartage, do not constitute contracts between the carriers and the shippers, which will survive a determination of the Commission that such allowances constituted rebates, and were illegal.<sup>93</sup> An agreement between an interstate carrier and the owner of certain animals transported in interstate commerce for the confinement of the animals for a period longer than 36 hours is void, as prohibited by the 28-hour law.<sup>94</sup> A lumber company, using a railroad owned by stockholders of a rival lumber company that operated as a separate corporation, would be given a rebate

90. *Ky.*—*Louisville & N. R. Co. v. Allen* (Ky.), 153 S. W. 198.

*La.*—*Louisiana Ry. & Nav. Co. v. Holly*, 127 La. 615, 53 So. 882.

*Mass.*—*New York, etc., R. Co. v. York & Whitney Co.* (Mass.), 102 N. E. 366, estoppel cannot be based on an illegal contract.

*N. C.*—*Yorke Furniture Co. v. Southern Ry. Co.* (N. C.), 78 S. E. 67.

*N. M.*—*Pecos Valley & N. E. Ry. Co. v. Harria*, 14 N. M. 410, 94 Pac. 951.

*N. Y.*—*Baltimore & O. R. Co. v.*

*La Due*, 108 N. Y. Supp. 659, 57 Misc. Rep. 614.

91. *Dunne & Grace v. St. Louis & S. W. Ry. Co.*, 166 Mo. App. 372, 148 S. W. 997; *St. Louis S. W. Ry. Co. of Texas v. Spring River Stone Co.*, 169 Mo. App. 109, 154 S. W. 465.

92. *W. H. Ferrell & Co. v. Great Northern Ry. Co.*, 119 Minn. 302, 138 N. W. 284.

93. *American Sugar Refining Co. v. Delaware, etc., Ry. Co.*, 200 Fed. 652.

94. *Webster v. Union Pac. R. Co.*, 200 Fed. 597.

contrary to the Interstate Commerce Act if a nondiscriminatory agreement between the two lumber companies were construed to entitle the former company to the same proportion of the interstate freight rates on its shipments which the railroad company receives on the interstate shipments by the other lumber company.<sup>95</sup> A contract binding carriers of an interstate shipment of cattle to so handle them as to get them into market by a specified time, and to feed and water them only once *en route*, so that they will take a heavy fill and weigh more at destination than if fed and watered more than once *en route*, is invalid as in violation of the Elkins Act, prohibiting discrimination between shippers.<sup>96</sup> A railroad company is bound under the Interstate Commerce Act to charge the rate fixed thereby on freight according to its classification.<sup>97</sup> Rates for transportation of freight in interstate commerce inserted in a contract by a carrier's agent are invalid if inconsistent with the schedules filed with the Interstate Commerce Commission.<sup>98</sup> Under Interstate Commerce Act, § 2, and section 6 of the act as amended by Act June 29, 1906, § 2, a railroad's agreement to refund a part of rates lawfully charged and collected was in violation of law and unenforceable.<sup>99</sup> Where a carrier sells a return excursion ticket for interstate transportation at a rate duly scheduled and filed as required by the Interstate Commerce Act, to expire on July 15, the carriage of the passenger after July 12, the mistakenly written expiration date of the ticket issued to the passenger, is not a violation of the Interstate Commerce Act, since the

95. *Fourche River Lumber Co. v. Bryant Lumber Co.*, 230 U. S. 316, 33 Sup. Ct. 887.

96. *St. Louis, etc., Ry. Co. v. West Bros.* (Tex. Civ. App.), 159 S. W. 142.

97. *Hardaway v. Southern Ry. Co.*, 90 S. C. 475, 73 S. E. 1020.

The designation of a typewriter, dictionary, wearing apparel, trunk, and personal effects as emigrant

movables was not a violation of the Interstate Commerce Act. *O'Connor v. Great Northern Ry. Co.*, 118 Minn. 223, 136 N. W. 743.

98. *McManus v. Chicago G. W. Ry. Co.*, — Iowa, —, 136 N. W. 769.

99. *Louisville & N. R. Co. v. Coquillard Wagon Works' Assignees*, 147 Ky. 530, 144 S. W. 1080.

erroneous issuance of a ticket in terms not conforming to the actual contract does not make an unlawful contract.<sup>1</sup> Under Interstate Commerce Act, Feb. 4, 1887, § 6, as amended by Act June 29, 1906, § 2, which requires connecting railroads which have established through routes and joint rates to file and publish schedules showing the same, and also showing all terminal and other charges," any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges," routes and rates so established become a matter of public right and a stipulation in a bill of lading for a greater or less rate or permitting the carrier to make a different routing under conditions not provided for in the schedules, by which the cost to the shipper is affected, is void, and affords no defense to an action by the shipper to recover a sum exacted in excess of the schedule rate.<sup>2</sup> Under the Interstate Commerce Act, Feb. 4, 1887, § 2, prohibiting discrimination by special rate or device, a contract by a carrier for transportation for a less compensation than

1. *Illinois Cent. R. Co. v. Fleming*, 148 Ky. 473, 146 S. W. 1110; *Illinois Cent. R. Co. v. Roberts*, 148 Ky. 478, 146 S. W. 1113.

2. *Louisville & N. R. Co. v. Dickerson*, 91 Fed. 705, affg. judg. *Dickerson v. Louisville & N. R. Co.*, 187 Fed. 874.

Where the agent of an interstate railway contracted with a shipper to transport live stock from a point in Arkansas to a point in Oklahoma, and the shipments had to pass over the lines of the initial carrier and of another interstate carrier; no through rate had ever been filed with the Interstate Commerce Commission and published, but the initial carrier had on file and published an interstate rate on shipments from the point of origin of the shipments involved to the junction point in Kan-

sas, and the delivering carrier had on file and published a rate from the junction point to destination; and the through rate contracted for by the initial carrier was less than the sum of the combined rates, it was held that, under Interstate Commerce Act Feb. 4, 1887, § 6, as amended by Act June 29, 1906, § 2, the special contract was void, and the delivering carrier who on the delivery of the consignment to it by the initial carrier had paid the freight charges of the initial carrier in accordance with its tariff was entitled on delivery of the shipments to the consignee to collect from him the freight charges so paid, and its freight charges in accordance with the tariff on file. *Atchison, etc., Ry. Co. v. Bell*, 31 Okl. 238, 120 Pac. 987.

the published rate is invalid, and where at the time of a shipment neither the carrier nor the shipper had actual knowledge of the actual weight of the goods, and the carrier received compensation based on a specified weight while the goods actually weighed more, it could recover the balance according to the schedule of rates established and filed.<sup>3</sup> A contract of shipment made by a railroad company which contains a provisions providing for carriage by a particular train or within a particular time is not discriminatory and void within the meaning of the Interstate Commerce Act, and this rule applies as well to contract as to tort actions.<sup>4</sup> A contract between a carrier and a shipper to transport the latter's goods in interstate or foreign commerce, at the then established rate, for a definite time, is ineffective after a higher rate has been filed and published as required by law.<sup>5</sup> Where, in an action by a carrier against a consignee for freight charges based on the schedule filed with the Interstate Commerce Commission, defendant counter-claimed for prior charges exacted by defendant in excess of the rates fixed by an agreement between the parties, valid before the

3. *Pennsylvania R. Co. v. Mogi*, 128 N. Y. Supp. 643, 71 Misc. Rep. 412.

If a rate quoted is less than the schedule rate approved by the Interstate Commerce Commission and published, the shipper is liable for the full rate, whether he actually knows that the rate quoted is less than the schedule rate or not. *Baldwin Sheep & Land Co. v. Columbia Southern Ry. Co.*, 58 Or. 285, 114 Pac. 469.

The act of the agent of a railroad company in contracting to carry goods at an illegal rate will not estop the carrier from repudiating such contract, as an estoppel cannot be founded upon an illegal act. *Baltimore, etc., Ry. Co. v. New Albany Box, etc., Co.*, 48 Ind. App. 647, 94

N. E. 906; *Atchison, etc., Ry. Co. v. Holmes*, 18 Okl. 92, 90 Pac. 22.

<sup>4</sup>The Interstate Commerce Law abrogated the right of the carrier and shipper to fix the freight rate by contract; the law fixing the rate. *Id.*

4. *Kirby v. Chicago & A. R. Co.*, 146 Ill. App. 31.

5. *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135.

The time during which a rate different from the rate agreed upon between the carrier and a shipper is established by the filing and publishing of such rate is excepted from the term of such contract by the acts of Congress regulating commerce which are a part thereof. *Id.*

passage of the Interstate Commerce Act, plaintiff had the burden of showing that the agreement was contrary to the provisions of the act.<sup>6</sup> A limitation of liability in a receipt for an express package is invalid, as to an interstate shipment.<sup>7</sup> When a freight rate has been fixed and properly posted and published as required by the interstate commerce act with reference to shipments to which the act applies, such rate must prevail over an agreement fixing a different rate.<sup>8</sup> A bill of lading of an interstate shipment, which contains clauses repugnant to the Interstate Commerce Act, Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, is not thereby entirely vitiated, but the holder thereof may recover for a failure to safely transport the goods.<sup>9</sup> Under the Interstate Commerce Act, Feb. 4, 1887, a person dealing with a carrier is as effectually bound by the law and the orders of the Commerce Commission, as to both freight and passenger tariffs, as is the carrier itself, and neither is estopped to assert the illegality of a contract made in violation of the act and orders of the Commission.<sup>10</sup>

### § 36. Damages for violations of regulations.

The liability of a carrier to a shipper who has paid the lawful published freight rates, while lower rates resulting from rebates have been allowed other shippers during the same period between

6. *Baltimore & O. R. Co. v. La Due*, 108 N. Y. Supp. 659, 57 Misc. Rep. 614.

Where it appeared that local freight rates had been filed with the Interstate Commerce Commission, but there was no proof that no through rate had been filed, an agreement by a carrier to transport at a rate less than the local rates was not shown to be illegal, though, if no through rate had been filed, the local rate would control. *Id.*

7. *Silverman v. Weir*, 114 N. Y. Supp. 6.

8. *Fisher v. Great Northern Ry. Co.*, 49 Wash. 205, 95 Pac. 77.

9. *Central of Ga. Ry. Co. v. Sims*, 169 Ala. 295, 53 So. 826.

10. *Melody v. Great Northern Ry. Co.*, 25 S. D. 606, 127 N. W. 543.

A ticket issued to a passenger by a carrier in violation of the terms and conditions of orders of the Interstate Commerce Commission confers no right to passage, and is not required to be accepted by the conductor of a train, and such passenger may be ejected without liability by the carrier to damages. *Id.*

the same termini, is limited to the pecuniary loss suffered by Act Feb. 4, 1887, § 8, together with a reasonable attorney's fee.<sup>11</sup> Where defendant failed to post an established rate at a station from which plaintiff's cattle were shipped, whereby he was compelled to pay a rate higher than if he had shipped under a competitive rate over another road, he was entitled to recover the difference under Interstate Commerce Act, § 8.<sup>12</sup> A shipper, who is charged by a railroad company on an interstate shipment a rate in excess of that established by the company and filed with the Interstate Commerce Commission, is injured by such unlawful rate within the meaning of the Interstate Commerce Act, Feb. 4, 1887, § 13, without regard to the question of its reasonableness, and under section 16 the Interstate Commerce Commission has power to make an award of damages therefor which may be enforced by action in a Circuit Court.<sup>13</sup> The effect of Interstate Commerce Act, Feb. 4, 1887, as amended, including the amendment by Act June 29, 1906, as construed by the Supreme Court, is not merely to suspend the right of a shipper to maintain an action at law to recover damages resulting from an unreasonable rate or discriminating regulation or practice established by an interstate carrier while such rate or regulation remains in force, but to supersede such right entirely, and substitute therefor the

11. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 33 Sup. Ct. 887. — L. Ed. —. See also, *Pennsylvania R. Co. v. International Coal Mining Co.*, 173 Fed. 1, 97 C. C. A. 383.

12. *St. Louis S. W. Ry. Co. of Texas v. Lewellen Bros.*, 192 Fed. 540, 113 C. C. A. 414, writ of *certiorari* denied 225 U. S. 701, 32 Sup. Ct. 835, 56 L. Ed. —.

Survival of action on death of plaintiff.—An action for damages brought against a carrier under Interstate Commerce Act, § 9, on the

death of the plaintiff, may be revived in the name of his executors, under Act Pa. Feb. 24, 1834 (P. L. 78), § 28. *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486.

13. *Chicago, etc., R. Co. v. Feintuch*, 191 Fed. 482.

An action by an interstate shipper to recover damages for a charge of illegal and excessive rates is, under section 16, not maintainable until after a hearing and award before the Interstate Commerce Commission. *Howard Supply Co. v. Chesapeake & O. Ry. Co.*, 162 Fed. 188.

remedy provided by the act itself; and the shipper's independent right of action in a court is not revived by the abolition of the unlawful rate or regulation.<sup>14</sup> An action against a carrier for discrimination in rates and granting unlawful rebates to plaintiff's competitors, affecting not only the plaintiff, but other shippers in the same region, cannot be first instituted in a federal Circuit Court; the Interstate Commerce Commission having exclusive original jurisdiction to determine whether a regulation or practice affecting rates or matters sought to be regulated by the Interstate Commerce Act is unjust or unreasonable, unjustly discriminatory, preferential, or prejudicial, and this though the regulation or practice complained of had ceased.<sup>15</sup>

Refusal of an interstate carrier to furnish cars for the shipment of plaintiff's cross-ties, while furnishing cars to others for interstate shipment of other freight, constitutes an unjust discrimination in violation of Interstate Commerce Act, Feb. 4, 1887, § 3, for which plaintiff was entitled to recover full damages with an attorney's fee and costs as authorized by section 8.<sup>16</sup> Congress by Interstate Commerce Act, Feb. 4, 1887, as amended by Act June 29, 1906, having established the Interstate Commerce Commission with plenary power to determine in the first instance what rates for the transportation of interstate commerce are legal and reasonable and what are illegal and excessive, it will be presumed, in the absence of averments to the contrary, that every interstate carrier has complied with the law by establishing, printing, filing, publishing and posting them; and hence no action can

14. *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 183 Fed. 929, 106 C. C. A. 269, affg. judg. 176 Fed. 748.

A party claiming to be injured by a discriminatory rule for the distribution of coal cars by an interstate railroad cannot maintain in a court of law an action for the recovery of damages before the Interstate Commerce Commission has in-

vestigated the case, and determined by its report that the rule is or was discriminatory. *Id.*

15. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 183 Fed. 908, dismissing for want of jurisdiction 181 Fed. 403.

16. *American Tie & Timber Co. v. Kansas City Southern Ry. Co.*, 175 Fed. 28.



be maintained unless the complaint alleges that resort has been had to the Interstate Commerce Commission and the rate charged and paid declared excessive or unreasonable.<sup>17</sup> The Sherman Anti-Trust Law, July 2, 1890, § 7, does not give any right of action for damages sustained by the payment of excessive, unjust, or unreasonable rates to interstate carriers, such relief being provided for by the Interstate Commerce Act.<sup>18</sup> A shipper may maintain an action at law under the Interstate Commerce Act, Feb. 4, 1887, § 9, to recover damages from an interstate railroad company because of the giving of a preference or advantage to another shipper by permitting him to keep cars on its terminal tracks without payment of the charges fixed by its schedules while denying the same right to plaintiff.<sup>19</sup> Two methods of procedure are prescribed for the recovery of damages for violation of the Interstate Commerce Law: one by section 9, Act Feb. 4, 1887, by an action at law; and the other by complaint to the Interstate Commerce Commission under sections 14, 15, 16, as amended by Act June 29, 1906, §§ 3, 4, 5, and the provision of section 16 as so amended, that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues," is merely a limitation as to time upon the second method, and does not deprive a party injured of the right to sue at law.<sup>20</sup> Where a count in a complaint against an interstate carrier alleged a discrimination in rates against plain-

17. *Meeker v. Lehigh Valley R. Co.*, 162 Fed. 354; *Wabash R. Co. v. Priddy* (Ind.), 101 N. E. 724.

In an action for injuries to complainant's property and business by an alleged combination and conspiracy between interstate railroads controlling the shipment of anthracite coal, an allegation that plaintiffs' loss resulted from their being obliged to pay "unlawful rates" for the transportation of coal due to

such combination and conspiracy was not effective to allege that the rates charged had been declared unlawful by the Interstate Commerce Commission. *Meeker v. Lehigh Valley R. Co.*, 162 Fed. 354.

18. *Meeker v. Lehigh Valley R. Co.*, 162 Fed. 354.

19. *Lyne v. Delaware, etc., R. Co.*, 170 Fed. 847.

20. *Lyne v. Delaware, etc., R. Co.*, 170 Fed. 847.

tiff, in that defendant charged plaintiff the full tariff rates and permitted plaintiff's competitors by a device to transport their similar products at a lower rate, it stated a cause of action for violating Interstate Commerce Act, Feb. 4, 1887, § 2, prohibiting discrimination, and was therefore not demurrable, though it also insufficiently attempted to allege a combination or conspiracy, on defendant's part, with certain other railroads to restrain trade, and to recover treble damages under the Sherman Anti-Trust Act, Act July 2, 1890.<sup>21</sup> A shipper is not authorized to recover of an initial carrier of live stock, as damages for misrepresentation, the difference between the rate stated by the initial carrier for a through interstate shipment and the authorized published rate which he was required to pay.<sup>22</sup> To support an action by a shipper against a carrier under section 8 of the Interstate Commerce Act, Feb. 4, 1887, he must show either that there has been some unreasonable or excessive charge imposed or some unlawful discrimination practiced against him by which he has been pecuniarily damaged, and he cannot recover, on a mere technical construction of the law, because, in addition to the ordinary scheduled rate, an extra charge for icing service, also shown by the schedules, but separately, has been collected from him, where such charge is not shown to be unreasonable and has not been so held by the Interstate Commerce Commission.<sup>23</sup> In an action against a carrier

21. *American Union Coal Co. v. Pennsylvania R. Co.*, 159 Fed. 278.

A petition alleging that the rate charged plaintiffs on interstate shipments was in excess of that charged other shippers and unreasonable, was demurrable, where failing to allege that the rate charged exceeded the tariff filed under the Interstate Commerce Act. *A. P. Brantley Co. v. Ocean S. S. Co.*, 5 Ga. App. 844, 63 S. E. 1129.

It is within the exclusive power of

the Interstate Commerce Commission and the federal courts to determine whether the tariffs or joint tariffs filed under the Interstate Act are reasonable or not; but, if a carrier charges more than the rate set out in the published schedule, an action will lie in a State court for the difference between the schedule rate and the rate charged. *Id.*

22. *Texas & P. Ry. Co. v. Leslie* (Tex. Civ. App.), 131 S. W. 824.

23. *Knudsen-Ferguson Fruit Co. v.*

for damages for refusal to carry goods at the rate filed with and published by the Interstate Commerce Commission, the question whether the carrier refused to transport the goods except at an excessive rate is for the jury; and the measure of damages is not the mere difference between the correct rate and the quoted rate where, by reason of the higher quotation, the shipper was forced to forego the shipment and sell the goods at a loss.<sup>24</sup>

### § 37. The common law in interstate commerce.

There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes.<sup>25</sup> Our ancestors brought with them, and claimed as their birthright, as subjects of Great Britain, throughout their colonial existence, the general principles of the common law of England, in so far as that law was applicable to their situation in their new surroundings and conditions; and, in their transition from a colonial to an independent political state, retained this established system of jurisprudence as one already complete, and adequate immediately to define and to protect their rights

Michigan Cent. R. Co., 148 Fed. 968, 79 C. C. A. 46.

24. *Aldrich v. Southern Ry. Co.* (S. C.), 79 S. E. 316.

Under the Interstate Commerce Act, providing that the certificate of the secretary of the Interstate Commerce Commission shall be *prima facie* evidence of the correct rate, letters of an interstate carrier's general freight agent, quoting an incorrect rate, are admissible. *Id.*

25. *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, 1 Int. Com. Rep. 804; *Wheaton v. Peters*, 8 Pet. (U. S.) 591, 658, 8 L.

Ed. 1055, 1079, "it is clear there can be no common law of the United States. When therefore a common law right is asserted, we must look to the State in which the controversy originated;" *Bucher v. Cheshire Railroad*, 125 U. S. 555, 583; *United States v. Worrall*, 2 Dall. (U. S.) 555; *Dawson v. Shaver*, 1 Blackf. (Ind.) 204, "the common law of England is not in force in the United States, as a federal government;" *People v. Folsom*, 5 Cal. 373, "there is no common law of the United States, as contradistinguished from the individual States."

of person and property, and of citizenship generally, without awaiting the slow growth of a new system to be thereafter matured by legislation and judicial decision. The greater part of the common law in the United States is derived from the common or unwritten law of England, "those principles, usages and rules of action applicable to the government and security of persons and property which do not rest for their authority upon any express and positive declarations of the will of the legislature."<sup>26</sup> This portion of the English law as it existed in 1607, when the colonists from England settled in America, or in some States at a later date, and English statutes amendatory of the common law enacted prior to a specified time, have either been expressly adopted by a constitutional provision or by statute in most States, or have been recognized by the courts as in force, except in so far as conditions render them inapplicable or they have been changed by statute.<sup>27</sup> No act can be punished as a crime against the United States, unless an act of Congress has declared it a crime, and prescribed the punishment and the court which shall have jurisdiction of the offense, since the Federal courts have no common law jurisdiction in criminal cases and can exercise such powers only as are conferred upon them by Act of Congress.<sup>28</sup> But where an act of Congress punishes an offense without defining it otherwise than by giving it a common law designation, the courts look to the common law for the definition and elements of the offense.<sup>29</sup>

There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the common law, and

26. 1 Kent. Comm. 469.

27. Cyc. Vol. 8, p. 369, and authorities there cited.

28. United States v. Hudson, 7 Cranch (U. S.), 32, 3 L. Ed. 259.

29. In re Green, 52 Fed. 194; United States v. Palmer, 3 Wheat. (U. S.) 610, 4 L. Ed. 471.

are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of the Federal courts, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be applied in the subject, and constitutes a common law resting on national authority.<sup>30</sup> An interstate carrier is free to exercise all his common law rights, except as prohibited by the Interstate Commerce Act.<sup>31</sup>

**§ 38. Common law remedies of the State courts in interstate commerce.**

The Supreme Court, two justices dissenting, in a recent case,<sup>32</sup> sustained the jurisdiction of a State court<sup>33</sup> to compel a carrier by mandamus or other proper writ to discharge its common law duty to treat all shippers alike, by resuming the transfer and return of cars loaded and unloaded between the line of a connecting carrier and the flour mill and elevator of a particular shipper, upon the latter's request and demand and payment of the theretofore customary charges. The majority held that such action was not beyond the power of the State court—at least in the absence of specific action by Congress or the Interstate Commerce Commission—although both carriers were engaged in interstate commerce, and the bulk of the output of the mill was shipped out of the State. It was conceded that no duty was imposed on the railroad company by act of the Legislature or mandate of Commission or other administrative board, except in so far as general power was given to the Interstate Commerce Commission and discrimination was declared unlawful by the Interstate Commerce Act of 1887. Basing

30. *Smith v. Alabama*, *supra*; *Moore v. United States*, 91 U. S. 270, 23 L. Ed. 346.

31. *Union Pac. R. Co. v. Updike Grain Co.*, 178 Fed. 223, 101 C. C. A. 583.

32. *Missouri Pac. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. —, 29 Sup. Ct. 214.

33. *Larabee Flour Mills Co. v. Missouri Pac. R. Co.*, 74 Kans. 808, 88 Pac. 72.

its decision upon the reasoning of cases in which State legislatures, in the exercise of police power in matters of local concern, have incidentally regulated interstate commerce,<sup>34</sup> the court held that the mere delegation by Congress to the Interstate Commerce Commission of certain national powers over interstate commerce is not the equivalent of the specific action by Congress in respect to the particular matters involved, which prevents a State from making regulations conducive to the welfare and the convenience of its citizens that may indirectly affect commerce.

The minority of the court in a dissenting opinion contended that this was not a mere incidental matter, indirectly affecting interstate commerce, but directly a part of such commerce, and therefore beyond the power of the State to control; that it was a direct regulation in matters of national concern over which control was vested in the Interstate Commerce Commission; that a power clearly withdrawn from the State and vested in the nation, can no longer be exercised by the State, even though Congress is silent; that carriers should not be subject to conflicting regulations or be left uncertain as to which government may rightfully assert its controlling authority; and that since the legislature could not legislate concerning the matter, the State courts had no jurisdiction. In support of these views similar cases were cited<sup>35</sup> and one which was claimed to be controlling.<sup>36</sup> In that case was presented and determined solely the power of a State commission to make orders respecting the delivery of cars engaged in interstate commerce beyond the right of way of the carrier and to a private siding—an

34. *Cleveland, etc., R. Co. v. Illinois*, 177 U. S. 514, 44 L. Ed. 868, 20 Sup. Ct. 722 (899); *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. 92; *Wisconsin, etc., R. Co. v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488.

35. *Gibbons v. Ogden*, 9 Wheat.

(U. S.) 1. 204, 6 L. Ed. 23, 72 (1824); *Asbell v. Kansas*, 209 U. S. 251, 52 L. Ed. 778, 28 Sup. Ct. 485; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. Ed. 230, 28 Sup. Ct. 485.

36. *McNeill v. Southern R. Co.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722.

order which affected the movement of the cars prior to the completion of the transportation. The Commission was thus exercising a legislative function and making rules for the regulation of transportation outside of the common law duties of a carrier and those imposed by Congress in such a way as to burden interstate traffic; in the absence of any evidence of discrimination, the order of the Commission imposed a new duty upon the carrier,<sup>37</sup> and the order was held to be a regulation of such commerce, and repugnant to the commerce clause of the Constitution.

In this case there was presented, as already stated, the question of the power of the State to prevent discrimination between shippers, and the common law duty resting upon a carrier was enforced. Congress had declared the duty and the State court was merely enforcing that duty under the common law as declared by Congress. Here the carrier had established the track and the station and assumed the duties of a common carrier towards all who applied for transportation. Congress had made the regulation, not the State, and the court was enforcing such regulation. There was no burden imposed upon interstate traffic by the State. The carrier was held to no greater duty than he had assumed.

The principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by Congressional enactments,<sup>38</sup> and both the State and Federal courts have concurrent jurisdiction,<sup>39</sup> subject to the Constitution and laws of the United States. It has been declared by Congress itself in section 22 of the Interstate Commerce Act that "nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

37. Covington Stock Yards Co. v. Keith, 139 U. S. 128.

38. Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561; Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U.

S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185; Murray v. Railroad Co., 62 Fed. 24, 35 C. C. A. 62.

39. Martin v. Hunter, 1 Wheat. (U. S.) 339.

**§ 39. Commerce Court created.—Jurisdiction and powers of Court.**

The Commerce Court was created by the Mann-Elkins Act of June 18, 1910. By that Act it is provided that the Commerce Court "shall have the jurisdiction now possessed by Circuit Courts of the United States and the judges thereof over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section 3 of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a Circuit Court of the United States; that is, proceedings against carriers and parties interested to enjoin or restrain departures from published rates or any illegal discrimination such as rebates or the various forms of discriminatory practices of which railroads and other carriers are accused.

Fourth. All such mandamus proceedings as under the provisions of section 20 or section 23 of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a Circuit Court of the United States.<sup>40</sup>

It is further provided by said Act of 1910, as follows: "Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the Circuit Courts of the United States

**40. Act of June 18, 1910, Par. 1,**  
*infra.*



or the judges thereof, that is hereby transferred to and vested in the Commerce Court.”<sup>41</sup>

“The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this Act shall not affect the jurisdiction now possessed by any Circuit or District Court of the United States over cases or proceedings of a kind not within the above-enumerated classes.”<sup>42</sup>

“In all cases within its jurisdiction the Commerce Court, and each of the judges assigned thereto, shall, respectively, have and may exercise any and all of the powers of a Circuit Court of the United States and of the judges of said court, respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred. The Commerce Court may issue all writs and process appropriate to the full exercise of its jurisdiction and powers and may prescribe the form thereof. It may also, from time to time, establish such rules and regulations concerning pleading, practice, or procedure in cases and matters within its jurisdiction as to the court shall seem wise and proper. Its orders, writs, and process may run, be served, and be returnable anywhere in the United States; and the marshal and deputy marshal of said court and also the United States marshals and deputy marshals in the several districts of the United States shall have like powers and be under like duties to act for and in behalf of said court as pertain to United States marshals and deputy marshals generally when acting under like conditions concerning suits or matters in the Circuit Courts of the United States.”<sup>43</sup>

The jurisdiction and powers of the Commerce Court are thus clearly defined, and it was believed that it would be an effective instrumentality in bringing about uniform and correct interpretations of the laws regulating interstate commerce and afford relief

41. Act of June 18, 1910. Par. 2.  
*infra*.

43. Act of June 18, 1910, Par. 12,  
*infra*.

42. Act of June 18, 1910, Par. 3.  
*infra*.

from the situation which theretofore existed by reason of courts in different circuits interpreting the statutes in different ways, thus leading to confusion.

The Mann-Elkins Act of June 18, 1910, which created the Commerce Court and conferred upon it the jurisdiction then possessed by Circuit Courts of the United States and the judges thereof over all cases therein specifically enumerated arising under the Interstate Commerce Act, as amended, expressly excepts from the jurisdiction so conferred "all cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money."<sup>44</sup> The jurisdiction of the Commerce Court is made exclusive over cases enumerated in the Mann-Elkins Act, but the statute provides that "the Act shall not affect the jurisdiction now possessed by any Circuit or District Court of the United States over cases or proceedings of a kind not within the above enumerated classes."<sup>45</sup>

The Commerce Court, misconstruing its jurisdiction and powers, which by the wording of the law creating it and the apparent intent of the act was limited and restricted to reviewing the decisions of the Interstate Commerce Commission upon questions of law, at once assumed the right to review such decisions as to questions of fact. The result was that in practically every important case out of the first twenty-four which came before the Commerce Court the rulings of the Commission were upset and the work of the Commission to a great extent nullified. The Supreme Court of the United States finally settled the question of the jurisdiction of the Commerce Court by substantially holding that it was limited in reviewing the Commission's orders to questions of law. The Supreme Court held that the jurisdiction of the Commerce Court under the Judicial Code of March 3, 1911, § 207, of "cases brought to enjoin, set aside, annul, or suspend, in whole or in part,

44. Act June 18, 1910, Par. 1.

45. Act June 18, 1910, Par. 1.

any order of the Interstate Commerce Commission," embraces only complaints of affirmative action by the Commission, and does not confer the power to redress a complaint based solely upon the refusal of the Commission to award the relief asked by a shipper against demurrage regulations, upon the ground that the Federal Statutes gave no right to the relief claimed.<sup>46</sup> In an opinion, sustained by the entire court, Chief Justice White stated the question for decision to be whether the authority of the Commerce Court was confined to enforcing and restraining, as the case might be, affirmative orders of the Commission, or whether it had the power to exert its own judgment by original interpretation of the administrative features of the act to regulate commerce, and upon that assumption to treat a refusal of the Commission to grant relief as an affirmative order and accordingly pass upon its correctness.

Both from the words of the act creating the Commerce Court and from the general scheme of rate regulation, the Chief Justice said it was to be seen that the Commerce Court had no such broad powers as it assumed to possess.

"It cannot be disputed," said Chief Justice White, "that the act creating the Commerce Court was intended to be but a part of an existing system for the regulation of interstate commerce, and that the making of it a part of that system was not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient by providing a more harmonious means for securing the judicial enforcement of the act to regulate commerce."

The Chief Justice asserted that Congress had created the Interstate Commerce Commission as a *quasi*-judicial body to enforce the laws in order that there might be unity of regulation, and that from 1887 to 1910 it had not been even seriously asserted that, as to subjects which in their nature were administrative, power lay in the courts to exercise original jurisdiction, or to enforce their

46. *Procter & Gamble Co. v. United States of America*, 282, 32 Sup. Ct. 761, 56 L. Ed. 1091, revg. judg. (Com. Ct.) 188 Fed. 221.

conceptions as to the meaning of the act by dealing directly with the subject, irrespective of any prior affirmative action by the Commission.

Originally, he said, the courts felt a duty to pass on both questions of law and of fact, but by 1910 it had come to pass that in considering orders of the commission the courts were limited to determining whether the orders of the commission violated the Constitution, conformed to statutory authority, or whether power had been so arbitrarily exercised by the commission as virtually to transcend the authority conferred, although it might not technically be doing so. It was this jurisdiction, he said, the Commerce Court had inherited.

“In view of the provisions of the Act to Regulate Commerce just referred to as originally enacted, of the legislative evolution of that Act, its uniform practical enforcement and the constant judicial interpretation we have thus briefly indicated, it is impossible.” Chief Justice White said, “we think, in reason, to give to the Act creating the Commerce Court the meaning affixed to it by the court below, since to do so would be to virtually overthrow the entire system which had arisen from the adoption and enforcement of the Act to Regulate Commerce. First, because, as the previous ascertainment by the Commission on complaint made to it as to whether violations of the act had been committed, with reference to the subjects as to which previous action was required, was an essential prerequisite to a right to complain in a court, the interpretation given below would, by destroying the necessity for the prerequisite action of the Commission, operate to create a vast body of rights which had no existence at the time the Commerce Court Act was passed. Second, because the recognition of a right in a court to assert the power now claimed would, of necessity, amount to a substitution of the court for the Commission, or, at all events, would be to create a divided authority on a matter where, from the beginning, primary singleness of action and unity was deemed to be imperative. Third, because the result of the

interpretation would be to bring about the contradiction and confusion it had been the inflexible purpose of the law maker from the beginning to guard against—an interpretation which would seemingly create rights hitherto nonexistent, and yet at once proceed to destroy such rights by bringing about a confusion which would render the rights which the Act creates practically valueless. Indeed, these inevitable results of the interpretation given by the court below to the Act would necessarily amount to declaring that Congress, in seeking to unify and perfect the administrative machinery of the Act to Regulate Commerce, and to make more beneficial its operation, had overthrown the whole fabric of the system as previously existing.”

The Commerce Court itself has held in a recent decision that the Commerce Court is without jurisdiction, under Judicial Code, § 207, subd. 2, to review an order of the Interstate Commerce Commission denying relief to a petitioner.<sup>47</sup>

**§ 40. Commerce Court abolished.—Jurisdiction vested in it transferred to and vested in the District Courts.**

Congress, by Act approved October 22, 1913, abolished the Commerce Court, created and established by the Act approved June 18, 1910, from and after December 31, 1913, and transferred to and vested in the several District Courts of the United States the jurisdiction vested in said Commerce Court by the Act which created it, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court were repealed.<sup>48</sup>

47. *Louisville & N. R. Co. v. United States*, 207 Fed. 591.

48. See *District Court Jurisdiction Act*, in Appendix.

## CHAPTER XXXIII.

### LIABILITY OF INITIAL CARRIER FOR LOSS OR DAMAGE ON CONNECTING LINES.—LIMITATION OF LIABILITY.

- SECTION 1. Liability of initial carrier for loss or injury under the Carmack Amendment.
2. Constitutionality of the act.
  3. Limitation of amount of liability to agreed value.
  4. Limitation of liability.—In general.
  5. The purpose and effect of the act.
  6. Initial interstate carrier cannot limit its liability to its own line.
  7. What law governs.—Jurisdiction of courts.
  8. Application of the act generally.

#### § 1. Liability of initial carrier for loss or injury under the Carmack Amendment.

An initial interstate carrier voluntarily accepting or receiving goods or property for shipment or transportation from a point in one State to a point on another line, in another State, is, under the Carmack Amendment, Act June 29, 1906, to the Interstate Commerce Act Feb. 4, 1887, conclusively treated as having made a through contract of carriage, thereby electing to treat the connecting carriers as its agents for all purposes of transportation and delivery, and it thereby becomes liable for the negligent failure of the other carrier to deliver the shipment to the consignee and for any loss of or injury to the shipment anywhere *en route*.<sup>1</sup>

1. *U. S.*—Galveston, etc., R. Co. v. Wallace, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516, aff'g judg. Galveston, etc., R. Co. v. Wallace, (Tex. Civ. App.) 117 S. W. 169, and Galveston, etc., R. Co. v. Crow, 117 S. W. 170; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; Louisville & N. R. Co. v. Scott, 219 U. S. 209, 31 Sup.

Ct. 171, 55 L. Ed. 183, aff'g judg. 133 Ky. 724, 118 S. W. 990; Norfolk & W. Ry. Co. v. Dixie Tobacco Co., 228 U. S. 593, 33 Sup. Ct. 609, — L. Ed. aff'g judg. 111 Va. 813, 69 S. E. 1106.

*Ark.*—Gibson v. Little Rock, etc., R. Co., 93 Ark. 439, 124 S. W. 1033; St. Louis, etc., R. Co., v. Furlow, 89 Ark. 404, 117 S. W. 517.

*Mo.*—Blackmer & P. Pipe Co. v.

A carrier receives property for transportation from a point in one State to a point in another, within the meaning of the Carmack amendment, making it liable under such circumstances for a loss anywhere *en route*, notwithstanding any stipulation to the contrary, where it accepts an interstate shipment to be transported over a route selected by the shipper, which was a different one from that which the carrier otherwise would have chosen, and was one respecting which the carrier had no established through route or rate.<sup>1a</sup> The initial carrier is liable, under the Carmack amendment, for any damage to the property by reason of the connecting carrier allowing an unauthorized inspection, but it is not liable for conversion of the goods, where they were not injured thereby though the consignee refused to accept them.<sup>2</sup> An initial carrier which contracted at a single rate to transport goods from a point in one State to a point in another State under a bill of lading that the cars should be stopped at intermediate points to receive additional shipments, is liable for damage to the shipments, including goods loaded at a point on the connecting line.<sup>3</sup> Where a car load of fruit trees was routed over several connecting lines under a contract of shipment, the initial carrier is liable to the shipper for loss of the freight following unauthorized diversion of the shipment from the specified route by the second car-

Mobile & O. R. Co., 137 Mo. Ap. 479, 119 S. W. 1.

N. J.—Travis v. Wells, Fargo & Co., 79 N. J. L. 83, 74 Atl. 444; Florman v. Dodd & Childs Express Co., —, 79 N. J. L. 63, 74 Atl. 446.

N. Y.—Earnest v. Delaware, etc., R. Co., 149 App. Div. 330, 134 N. Y. Supp. 323; Greenwald v. Weir, 130 App. Div. 696, 115 N. Y. Supp. 311.

Tex.—Missouri, etc., R. Co. v. Stark Grain Co., 103 Tex. 542, 131 S. W. 410, mod'g (Tex. Civ. App.) 120 S. W. 1146.

1a. Norfolk & W. Ry. Co. v. Dixie Tobacco Co., 228 U. S. 593, 33 Sup. Ct. 609, — L. Ed. —, affg. judg. 111 Va. 813, 69 S. E. 1106.

2. Earnest v. Delaware, etc., R. Co., 149 App. Div. (N. Y.) 330, 134 N. Y. Supp. 323.

3. De Winter & Co. v. Texas Cent. R. Co., 150 App. Div. (N. Y.) 612, 135 N. Y. Supp. 893, and a provision in a bill of lading covering a car load of goods that a stop should be made on a connecting line to receive an additional shipment does not defeat an

rier; the initial carrier having participated in **such** diversion.<sup>4</sup> But the initial carrier is not liable for damages to shingles where it loaded them into ordinary box cars, and they received injury on the line of a connecting carrier which loaded them into open cars, where the shipper, without notice to the initial carrier, changed the point of destination to a point far removed from the destination first indicated.<sup>5</sup> The initial carrier is liable for any injury occurring on the line of the connecting carrier, though the connecting carrier is not liable for injury on the line of the initial carrier.<sup>6</sup> Under Interstate Commerce Act, § 9, an initial carrier is liable for a continuous carriage of an interstate shipment, and a contract to the contrary is invalid.<sup>7</sup> A shipper of an interstate shipment is entitled to recover under the Hepburn Act, the entire damages from the initial carrier, though the connecting carriers are made parties.<sup>8</sup> The rule that recovery for loss of or injury to an interstate shipment may be had against the terminal carrier is not abrogated by the Hepburn Act, as amended by the

initial carrier's liability for injury to a shipment occurring on connecting line.

4. *Drake v. Nashville, etc., R. Co.*, (Tenn.), 148 S. W. 214.

Where a shipment routed over specified lines was diverted by the first two carriers without authority to a line not included in the contract, and that line received the shipment without sufficient shipping instructions, the three carriers are jointly and severally liable for loss resulting to the shipment. *Id.*

An initial carrier is liable for damage caused by a wrongful diversion of an interstate shipment by a connecting carrier in another state. *Kemendo v. Fruit Dispatch Co.* (Tex. Civ. App.), 131 S. W. 73.

5. *Parker-Bell Lumber Co. v. Great*

*Northern Ry. Co.*, 69 Wash. 123, 124 Pac. 389.

6. *Otrich v. St. Louis, etc., R. Co.*, 164 Mo. App. 444, 144 S. W. 1199, adopting opinion 154 Mo. App. 420, 134 S. W. 665.

Where carriers forming a continuous line contract to carry through for a single price, they are jointly and severally liable for injury to the freight on any part of the route. *Id.*

7. *Pittsburgh, etc., Ry. Co. v. Knox*, 177 Ind. 344, 98 N. E. 295.

8. *Missouri, etc., Ry. Co. v. Demere & Coggin*, (Tex. Civ. App.) 145 S. W. 623.

And the initial carrier cannot complain of a division of the damages, where the evidence was sufficient to sustain a judgment for all the damages, as, under the Hepburn Act, it



7  
**Carmack amendment.**<sup>9</sup> An initial carrier of an interstate shipment is liable under the Carmack amendment for the negligence and delay of its connecting carrier.<sup>10</sup> Under the Carmack amendment, an initial carrier of goods is liable for their destruction while in the hands of a connecting carrier, and property held by a carrier in its warehouse after a refusal of the consignee to accept, without any notice to the consignor, must be considered as still in interstate commerce for the purpose of determining liability for its destruction.<sup>11</sup> In view of the Carmack amendment, it does not affect the liability of the initial carrier to the consignor that failure to tender or deliver the shipment to the consignee was the fault of the connecting carrier.<sup>12</sup> The Carmack amendment, making an initial carrier liable for damages to his shipment upon the line of the connecting carrier, is intended merely to give a cumulative remedy, and does not prevent the shipper from maintaining an action against the connecting carrier at fault.<sup>13</sup> The delivery of a loaded car to a railroad company in one State for shipment to another State constitutes interstate transportation within the Carmack amendment, requiring the initial carrier to issue a bill of lading and making it liable to the holder for dam-

is liable for all the damages. *St. Louis, etc., R. Co. v. Fenley*, (Tex. Civ. App.) 118 S. W. 845.

9. *Tradewell v. Chicago & N. W. Ry. Co.*, 150 Wis. 259, 136 N. W. 794; *Uber c. Chicago, etc., Ry. Co.*, 151 Wis. 431, 138 N. W. 57.

10. *Pecos & N. T. Ry. Co. v. Cox*, (Tex. Civ. App.) 150 S. W. 265.

11. *Nashville, etc., Ry. Co. v. Dreyfuss-Weil Co.*, 150 Ky. 333, 150 S. W. 321. This ruling was based particularly on the part of the Amendment which defines "transportation" as including "all services in connection with \* \* delivery \* \* storage and handling of property trans-

ported." It may be questioned whether the shipment was not completed and the carrier become liable as warehouseman only.

12. *Howatt v. Barrett*, 78 Misc. Rep. (N. Y.) 156, 137 N. Y. Supp. 915.

13. *Baltimore, etc., Ry. Co. v. William Sperber & Co.*, 117 Md. 595, 84 Atl. 72, and the shipper does not waive his right to proceed, by joining both the initial and terminal carriers as defendants; the shipper is required to prove only that one of the defendants was the initial carrier, and that the damage to the shipment was done by some connecting carrier.

ages *en route*, and the failure of an interstate carrier to deliver a bill of lading, as required by the Carmack amendment, will not relieve it from the liability imposed by the act for damage to the property *en route*.<sup>14</sup> The Hepburn Act, imposing on the initial carrier liability for damage by connecting carriers, applies to every carrier receiving property for transportation to a point in another State, although its own line may lie wholly within the State of the place of shipment.<sup>15</sup> The Carmack amendment does not apply where the damage is not to the property itself, as where there is a mere delay in carriage.<sup>16</sup> An initial carrier of goods consigned to a point off its own line, which delivers the goods to a final carrier other than the one called for by the contract with the shipper, becomes thereby an insurer of the goods and liable for injury received in the hands of the final carrier.<sup>17</sup> The right granted by the Carmack amendment to the initial carrier giving the receipt or bill of lading of indemnity against a connecting carrier on whose line the damage from which the shipper's cause of action arose occurred, cannot be impaired by any agreement between the shipper or holder of the receipt or bill of lading and any of the connecting carriers: and the common law presumption that the damage occurred on the line of the final carrier can have no application to cases arising under the act, because that act expressly declares that the initial carrier in interstate shipments is liable without regard to the line on which the actual damage oc-

14. *W. H. Aton Piano Co. v. Chicago, etc., Ry. Co.*, 152 Wis. 156, 139 N. W. 743, and that a shipper in such a case obtained a bill of lading from a subsequent carrier to whom the goods were delivered would not affect the liabilities of the original carrier under such act.

15. *Shultz v. Skaneateles R. Co.*, 66 Misc. Rep. (N. Y.) 9, 122 N. Y. Supp. 445, aff'd 145 App. Div. (N. Y.) 906, 129 N. Y. Supp. 1146.

16. *Gulf, etc., Ry. Co. v. Nelson*, (Tex. Civ. App.) 139 S. W. 81, which also holds that, under a joint contract by connecting carriers to transport freight, each is liable for the default of the other.

See also *Southern Pac. Co. v. Weatherford Cotton Mills*, (Tex. Civ. App.) 134 S. W. 778.

17. *Houston, etc., R. Co. v. Kenmendo* (Tex. Civ. App.), 131 S. W. 634.

curred.<sup>18</sup> An initial carrier engaged in interstate commerce, which receives goods to be transported from a point within the State to a point without the State, is liable for a loss of the property caused by it or any connecting carrier, although it fails to issue a receipt or bill of lading therefor, as required by the Carmack amendment.<sup>19</sup> Delivery of an interstate shipment of freight to an intrastate railroad under a through bill of lading and a guarantee of a through rate is a through shipment, and is governed by the Carmack amendment, making initial carriers liable for loss or injury caused by connecting carriers.<sup>20</sup> A bill of lading dated in one State, showing a destination in another, and containing stipulations governing the entire transportation, specifying not only rights, duties, or limitations relating to the parties, but also to subsequent carriers, is a "contract for a through shipment" within the meaning of the Hepburn Act, making an initial carrier of an interstate shipment liable for loss on connecting lines.<sup>21</sup> Under the Carmack amendment the holder of a bill of lading is not bound to sue the initial carrier, but may sue directly an intermediate carrier for loss of or damage to goods on its line.<sup>22</sup> In an action by a shipper against an initial carrier for loss of goods shipped in interstate commerce, as authorized by the Hepburn Act June 29, 1906, § 7, the carrier may make any proper defense which can be made in a court of law and which any connect-

18. *Carlton Produce Co. v. Velasco, etc., Ry. Co.* (Tex. Civ. App.), 131 S. W. 1187.

19. *International Watch Co. v. Delaware, etc., R. Co.*, 80 N. J. L. 553, 78 Atl. 49.

20. *Houston, etc., R. Co. v. Lewis*, 103 Tex. 452, 129 S. W. 594.

21. *Southern Pac. Co. v. W. T. Meadors & Co.* (Tex. Civ. App.), 129 S. W. 170, *revd. on other grounds* 104 Tex. 469, 140 S. W. 427.

22. *St. Louis S. W. Ry. Co. of Texas v. Ray* (Tex. Civ. App.), 127 S. W. 281.

The Hepburn Amendment makes the initial carrier liable for an injury to an interstate shipment, but the connecting carrier is also liable if the injury is the result of its negligence. *Gibson & Draughn v. Little Rock, etc., Ry. Co.*, 93 Ark. 439, 124 S. W. 1033.

ing carrier may make.<sup>23</sup> The Interstate Commerce Act Feb. 4, 1887, § 20, as amended by the Hepburn Act June 29, 1906, § 7, making the initial carrier liable for any loss, damage, or injury caused by it or a connecting carrier, creates a liability for all loss or damage for which the carrier would be liable at common law.<sup>24</sup> Goods having been appropriated by the initial carrier, the liability is the same under the general law as it would be under the Hepburn Act.<sup>25</sup> Where a connecting carrier's liability as a carrier for an interstate shipment had terminated when it sold the goods for freight charges, the initial carrier would not be liable for the value of the goods under the Carmack Amendment to the Interstate Commerce Act.<sup>26</sup> An initial carrier, which was under no obligation by contract or otherwise, to notify a connecting carrier that the shipper desired a diversion of the shipment at a point on the connecting carrier's line, having delivered the shipment to the connecting carrier, was not liable, under the Act to Regulate Commerce Feb. 4, 1887, as amended by the Hepburn Act, for failure of the connecting carrier to make the diversion, as no fault was attributable to the connecting carrier.<sup>27</sup> In the absence of a partnership between connecting carriers, the initial carrier is the only one liable under the Carmack amendment for the entire damages connected with a shipment within the terms of the act.<sup>28</sup> Where cattle, delivered to the initial carrier in good condition, were, before the beginning of the transportation, subjected to treatment causing injuries, and the cattle, when delivered to a connecting carrier, were in an injured condition, the connecting carrier was not liable, and the initial carrier, ad-

23. *Riverside Mills v. Atlantic Coast Line R. Co.*, 168 Fed. 987.

24. *Louisville & N. R. Co. v. Warfield & Lee*, 6 Ga. App. 550, 65 S. E. 308.

25. *Central of Ga. Ry. Co. v. A. C. Douw & Co.*, 6 Ga. App. 858, 65 S. E. 1091.

26. *Norfolk & W. Ry. Co. v. Stuart's Draft Milling Co.*, 109 Va. 184, 63 S. E. 415.

27. *Patton v. Texas & P. Ry. Co.*, (Tex. Civ. App.) 137 S. W. 721.

28. *Eastern Ry. Co. of New Mexico v. Montgomery*, (Tex. Civ. App.) 139 S. W. 885.

judged liable to the shipper, could not, under Interstate Commerce Act June 29, 1906, recover over against the connecting carrier.<sup>29</sup> The word "State" was used in the provision in the Carmack amendment in its limited sense to represent and include only the States of the Federal Union, and such section has no application to a shipment from a State to a foreign country.<sup>30</sup>

## § 2. Constitutionality of the Act.

The Carmack amendment to the Hepburn Act (Act June 29, 1906), also known as the "Initial Carriers' Act," is constitutional.<sup>31</sup> The constitutionality of this act was questioned and the Circuit Court of the United States,<sup>31a</sup> and the courts of many of the States,<sup>32</sup> held that the provisions of section 20 of the Interstate Commerce Act Feb. 4, 1887, as amended by the Hepburn Act June 29, 1906, which make a common carrier receiving property for transportation from a point in one State to a point in another liable for all loss or damage to such property, whether it occurred on its own line or on connecting lines, and providing that no contract, receipt, rule, or regulation shall exempt it from such liability, are not unconstitutional, as interfering with the liberty of contract, or as depriving the carrier of its property without due process of law, but are within the power of Congress under

29. *Missouri, etc., Ry. Co. v. Jarmon*. (Tex. Civ. App.) 141 S. W. 155.

30. *Houston, etc., R. Co. v. Inman*. (Tex. Civ. App.) 134 S. W. 275.

31. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. —.

31a. *Smeltzer v. St. Louis, etc., R. Co.*, (C. C., 1908) 158 Fed. 649; *Riverside Mills v. Atlantic Coast Line R. Co.*, 168 Fed. 987.

32. *Ark.—St. Louis & S. F. R. Co. v. Heyser*, 95 Ark. 412, 130 S. W. 562.

*Ind.—Pittsburgh, etc., R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735.

*Mich.—Sturges v. Detroit, etc., Ry. Co.*, 166 Mich. 231, 18 Detroit Leg. N. 377, 131 N. W. 706.

*N. Y.—Welch Lumber Co. v. Norfolk & W. R. Co.*, 137 App. Div. 248, 121 N. Y. Supp 985, the act is not unconstitutional as an unwarranted interference with the freedom of contract; a contention that this act authorizes taking of property without due process of law really depends upon the contention that it is an unwarranted interference with the free-

the commerce clause of the Constitution.<sup>32a</sup> It was also held that under the common law, independently of statute, where a common carrier receives property for carriage beyond its own line, issuing a through bill of lading therefor, specifying the freight for through carriage, it makes its connecting carriers its agents, and is responsible to the shipper for any loss or damage to such property either on its own line or the connecting lines, which liability it cannot limit by contract.<sup>33</sup> The United States Supreme Court finally held that the liberty of contract secured by the fifth amendment of the Constitution, was not unconstitutionally denied by the enactment of Congress, in the exercise of its power under the commerce clause, of the Carmack amendment Act June 29, 1906, § 7, to Act Feb. 4, 1887, § 20, by which an interstate carrier voluntarily receiving property for transportation from a point in one State to a point in another State is made liable to the holder of the bill of lading for a loss anywhere *en route*, in spite of any agreement or stipulation to the contrary, with a right of recovery over against the carrier actually causing the loss; nor is the property of the initial carrier taken in violation of the fifth amendment, to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of the loss, since the liability of the receiving carrier which results in such

dom of contract, and as the act merely regulates the liability of the carrier, and prevents it from exempting itself from that liability by contract, the question of due process of law is not involved.

*N. C.*—Reid v. Southern Ry. Co., 153 N. C. 490, 69 S. E. 618.

*Tex.*—Galveston, etc., Ry. Co. v. Crow, (Tex. Civ. App.) 117 S. W. 170.

*Va.*—Norfolk & W. R. Co. v. Dixie Tobacco Co., 111 Va. 813, 69 S. E. 1106.

**32a.** Subdivision 3, section 8, article 1, which authorizes Congress to regulate commerce between the States and Territories.

**33.** Smeltzer v. St. Louis, etc., R. Co., 158 Fed. 649; Reid v. Southern Ry. Co., 153 N. C. 490, 69 S. E. 618, the statute as amended merely declares the common law; Louisville & N. R. Co. v. Warfield & Lea, 6 Ga. App. 550, 65 S. E. 308, the statute as amended creates a liability for all loss or damages for which the carrier would be liable at common law.

a case is that of a principal for the negligence of his own agents.<sup>34</sup> In a later case the same court held that acceptance by a carrier of an interstate shipment to be transported over a route selected by the shipper, which was a different one from that which the carrier would otherwise have chosen, and was one respecting which the carrier had no established through route or rate, cannot be said to be so far involuntary that to construe the provisions of the Carmack amendment, as making such carrier answerable for the damages done by connecting carriers, notwithstanding any stipulation to the contrary, will take its property without due process of law.<sup>34a</sup> The Carmack amendment to the Interstate Commerce Act is a valid regulation of interstate commerce, and is not unconstitutional as operating to take private property for public purposes.<sup>35</sup> It is not unconstitutional as interfering with the rights of a State,<sup>36</sup> or as infringing State sovereignty,<sup>37</sup> or as denying to carriers equal protection of the laws,<sup>38</sup> or as taking the carrier's property without due process of law.<sup>39</sup> It is not violative of the

**34.** *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. —, aff'g judg. *Riverside Mills v. Atlantic Coast Line R. Co.*, 168 Fed. 990; *Louisville & N. R. Co. v. Scott*, 219 U. S. 209, 31 Sup. Ct. 171, 55 L. Ed. —, aff'g judg. 133 Ky. 724, 118 S.W. 990, also holding that the imposition upon an interstate carrier of liability to the holder of the bill of lading for a loss anywhere en route, which is made by the act, is a valid regulation of interstate commerce.

**34a.** *Norfolk & W. Ry. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 33 Sup. Ct. 609, — L. Ed. —, affg. judg. 111 Va. 813, 69 S. E. 1106.

**35.** *Louisville & N. R. Co. v. Scott*, 133 Ky. 724, 118 S. W. 990, judg. aff'd 219 U. S. 209, 31 Sup. Ct. 171,

55 L. Ed. —; *Houston, etc., R. Co. v. Lewis*, 103 Tex. 452, 129 S.W. 594. *Contra*: See *obiter dictum* *Norfolk & W. R. Co. v. Stuart's Drafting Mill Co.*, 109 Va. 184, 63 S. E. 415, relied on in *Drinker on Interstate Commerce Act*, Vol. 1, § 261.

**36.** *Galveston, etc., R. Co. v. F. A. Piper Co.*, (Tex. Civ. App.) 115 S.W. 107.

**37.** *Galveston, etc., R. Co. v. Wallace*, (Tex. Civ. App.) 117 S.W. 169.

**38.** *Galveston, etc., R. Co. v. Wallace*, (Tex. Civ. App.) 117 S.W. 169.

**39.** *Riverside Mills v. Atlantic Coast Line R. Co.*, 168 Fed. 990, aff'd *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. —; *Smeltzer v. St. Louis, etc., R. Co.*, 158 Fed. 649; *St. Louis, etc., R. Co. v. Heyser*, 95 Ark.

fifth amendment to the Constitution providing that no person shall be deprived of life, liberty, or property without due process of law.<sup>40</sup> The constitutionality of the act has been attacked on every possible ground and has been maintained by all the courts in which it has been questioned. No question with reference to the power of Congress to enact a regulation of interstate commerce can arise if the regulating act be one directly applicable to such commerce, not obnoxious to any other provision of the Federal Constitution, and reasonably adapted to the purpose by reason of legitimate relation between such commerce and the rule provided.<sup>41</sup>

### § 3. Limitation of amount of liability to agreed value.

That a common carrier cannot exempt itself from liability for its own negligence or that of its servants is elementary.<sup>42</sup> The rule of the common law did not limit a common carrier's liability to loss and damage due to its own negligence, or that of its servants, but made it liable as an insurer for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But it was an established rule of the common law that such a carrier may, by a fair, open, just, and

412, 130 S. W. 562; *Welch Lumber Co. v. Norfolk & W. R. Co.*, 137 App. Div. (N. Y.) 248, 121 N. Y. Supp. 985; *Galveston, etc., R. Co. v. Wallace*, (Tex. Civ. App.) 117 S. W. 169; *Galveston, etc., R. Co. v. Johnson & Johnson*, (Tex. Civ. App.) 133 S. W. 725.

40. *Fry v. Southern Pac. Co.*, 247 Ill. 564, 93 N. E. 906; *Missouri, etc., R. Co. of Texas v. Harriman Bros.*, (Tex. Civ. App.) 128 S. W. 932; *Galveston, etc., R. Co. v. F. A. Piper Co.*, (Tex. Civ. App.) 115 S. W. 107. *Contra: See obiter dictum Norfolk & W. R. Co. v. Stuart's Drafting Mill Co.*, 109 Va. 184, 63 S. E. 415, relied

on in *Drinker on Interstate Commerce Act*, Vol. 1, § 261.

41. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. —, aff'g judg. *Riverside Mills v. Atlantic Coast Line R. Co.*, 168 Fed. 990; *Louisville & N. R. Co. v. Scott*, 219 U. S. 209, 31 Sup. Ct. 171, 55 L. Ed. —, aff'g judg. 133 Ky. 724, 118 S. W. 990.

42. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —; citing *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. 151; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872, and other cases.



reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.<sup>43</sup> A liability for some default in its common law duty as a common carrier, as thus modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or its servants, and not liability as an insurer, was imposed by the Carmack amendment of June 29, 1906, to the Act of February 4, 1887, section twenty, under which a carrier receiving property for transportation is required to issue a receipt or bill of lading therefor, and is made liable to the holder for "any loss, damage, or injury to such property caused by it," or by any connecting carrier

43. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —; citing *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; *Calderon v. Atlas S. S. Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033, and other cases.

The Court said: "That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character, and value of the property carried.

"Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value for the

purpose of adjusting the rate conflict with any sound principle of public policy. The reason for the legality of such agreements is well stated in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 338, 28 L. Ed. 717, 720, 5 Sup. Ct. 151, where it is said:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed upon. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purpose of the contract for transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is

to whom the property may be delivered.<sup>44</sup> The shipper and carrier of an interstate shipment are not forbidden to contract to limit the carrier's liability to an agreed or declared value, made to adjust the rate, and the provision of the act that "no contract, receipt, rule, or regulation shall exempt such common carrier, rail-

no violation of public policy. On the contrary, it would be just and reasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

44. *Missouri, etc., R. Co. v. Harri-man Bros.*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. —; *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. —; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —.

The Court said: "The statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law, as that body of law applicable to carriers has been interpreted by this court, as well as many courts of the States, *Greenwald v. Barrett*, 199 N. Y. 170, 175, 35 L. R. A. (N. S.) 971, 92 N. E. 218; *Bernard v. Adams Exp. Co.*, 205 Mass. 254, 259, 28 L. R. A. (N. S.) 293, 91 N. E. 325, 18 Ann. Cas. 351. The exemption forbidden is, as stated in the case last cited, 'a statutory declaration that a contract of exemption from liability for negligence is against public policy and void.' This is no more than this court, as well as other courts administering

the same general law, have many times declared. In the same case, just such a stipulation as that here involved was upheld, the Court saying:

'But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is intrusted to him. It is to describe and define the subject-matter of the contract, so far as the parties care to define it, for the purpose of showing what value that is which comes to the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage, or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes.'

In *Greenwald v. Barrett*, cited above, the same conclusion was reached as to the nature of the lia-

road, or transportation company, from the liability hereby imposed" is not violated by a stipulation in a carrier's receipt so limiting its liability.<sup>45</sup>

The purpose of Interstate Commerce Act, June 29, 1906, section seven, providing that a carrier on receiving an interstate shipment shall issue a bill of lading therefor and be liable to the holder for any loss, and no contract shall exempt the carrier from the liability imposed, is to render the initial carrier of interstate ship-

bility imposed and the purport of the exemption forbidden, the court, among other things, saying:

"The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried; and the propriety of this practice and the legality of contracts signed by the shipper, agreeing upon a valuation of the property, were distinctly upheld by the Supreme Court of the United States in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 341, 28 L. Ed. 717, 721, 5 Sup. Ct. Rep. 151."

To the same effect are the cases of *Travis v. Wells, F. & Co.*, 79 N. J. L. 83, 74 Atl. 444; *Fielder v. Adams Exp. Co.*, 69 W. Va. 138, 71 S. E. 99; *Larsen v. Short Line R. Co.*, 38 Utah, 130, 110 Pac. 983. See also, *Atkinson v. New York Transfer Co.*, 76 N. J. L. 608, 71 Atl. 278, as to the general rule.

That a carrier rate may be graduated by value, and that a stipulation

limiting recovery to an agreed value, made to adjust the rate, is recognized by the Interstate Commerce Commission, see *Re Released Rates*, 13 Inters. Com. Rep. 550."

45. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —; *Chicago, etc., R. Co. v. Miller*, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. —; *Chicago, etc., R. Co. v. Latta*, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. —.

Inquiry as to the actual value of an interstate shipment is not vital to the fairness, under the Carmack amendment, of a stipulation in the carrier's receipt, limiting its liability to the declared or agreed value, where such receipt, as well as the published rates on file with the Interstate Commerce Commission, plainly show that the rate charged was based upon value. *Id.*

**Knowledge of shipper presumed.**—A shipper's knowledge that the carrier's rate was based upon the value of the shipment is to be presumed where this plainly appears from the terms of the bill of lading and from the published rates on file with the Interstate Commerce Commission. *Id.*

ments over connecting lines liable to the holder of the bill of lading for any loss to the property, whether occurring on its line or not, and to prevent interstate carriers from exempting themselves from liability for the loss of property after it has passed into the hands of another carrier for transportation, but it does not abrogate the right of the carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper on valuation of the property carried, and a contract limiting the carrier's liability to a specified sum in consideration of the rate charged, regulated by the value of the goods, is not invalid.<sup>46</sup> An agreement of shipment, limiting the liability of an express company for the freight shipped to a certain amount, is void at common law as against public policy, as well as by Iowa Code, § 2074, providing that no contract shall exempt a railway corporation from the liability of a common carrier which would exist had no contract been made; and such rule is not obviated by the provisions of the Interstate Commerce Act, making a common carrier liable to the holder of

46. *Greenwald v. Barrett*, 199 N. Y. 170, 92 N. E. 218, affg. order *Greenwald v. Weir*, 130 App. Div. 696, 115 N. Y. Supp. 311, which reversed 59 Misc. Rep. 431, 111 N. Y. Supp. 235; *Bernard v. Adams Express Co.*, 205 Mass. 254, 91 N. E. 325, the contract of shipment, made in good faith, providing that the carriage charges are regulated by the value put on the property, and that where, as in the instant case, no value is put thereon, it is agreed that the value does not exceed \$50, and that the carrier shall not be liable for a greater sum, not being an exemption from liability for negligence, but merely a contract as to the value of the property, and so not otherwise invalid, is not invalidated by § 7 of the Interstate Commerce Act as amended;

*Travis v. Wells, Fargo & Co.*, — N. J. Sup. —, 74 Atl. 444; *Fielder & Turley v. Adams Express Co.*, — W. Va. —, 71 S. E. 99.

In order to regulate its charges to its customers with reference to the value of the property transported, a common carrier may demand of the shipper a declaration of such value, or may agree with him that in default of a statement the value shall be deemed a given amount. This agreement may be direct and express, or it may arise indirectly out of the acceptance by the shipper of a receipt from the carrier in which it is stated that the value is to be considered a sum specified, if no other has been given by the shipper. *Greenwald v. Barrett*, 199 N. Y. 170, 92 N. E. 218.

Act Feb. 4, 1887, § 20, as amended

the bill of lading for any damage, etc., caused by it or by any subsequent carrier, and providing that no contract shall exempt such carrier from the liability thereby imposed.<sup>47</sup> Under the Interstate Commerce Act, as amended by Act June 29, 1906, any contract limiting the liability of a carrier of property transported in interstate commerce, in case of loss, to a stated maximum amount, is void.<sup>48</sup> Arbitrary limitations of value and preadjustments of the damage in contracts of carriage are invalid under the general law. Act Feb. 4, 1887, section twenty, and likewise under the Interstate Commerce Act, as amended by the Hepburn Act, June 29, 1906, section seven.<sup>49</sup> Interstate Commerce Act, as amended by Act June 29, 1906, providing that a carrier issuing a bill of lading shall be liable to the owner thereof for any injury to the property "caused" by it or any connecting carrier, and that no contract shall exempt the carrier from such liability, prohibits a carrier from limiting its liability; the word "caused" being coextensive with the measure of the carrier's liability under the common law.<sup>50</sup> An initial carrier under a contract of shipment of a car load of fruit trees over specified connecting lines, is liable for loss follow-

by Act June 29, 1906, § 7, making carriers liable for freight lost in interstate shipment, does not prevent a reasonable contract limiting a carrier's liability for injury to freight to a particular valuation per hundred weight in consideration of a reduced freight rate. *Larsen v. Oregon Short Line R. Co.*, — Utah, —, 110 Pac. 983.

The amended section only prohibits any contract exempting liability from losses caused by a connecting carrier to which defendant has delivered the goods. *Travis v. Wells, Fargo & Co.*, 79 N. J. Law, 83, 74 Atl. 444.

See *Vigouroux v. Platt*, 62 Misc. Rep. 364, 115 N. Y. Supp. 880; *Green-*

*wald v. Weir*, 59 Misc. Rep. 431, 111 N. Y. Supp. 235; *Schutte v. Weir*, 59 Misc. Rep. 438, 111 N. Y. Supp. 240; *Shidlovsky v. Mallory S. S. Co.*, 60 Misc. Rep. 67, 111 N. Y. Supp. 778, which held contrary to the rule stated in the text, and are overruled by *Greenwald v. Barrett*, *supra*.

47. *Winn v. American Express Co.*, 149 Iowa, 259, 128 N. W. 663.

48. *St. Louis, etc., R. Co. v. Pape*, 100 Ark. 269, 140 S. W. 265.

49. *Louisville & N. R. Co. v. Warfield & Lee*, 6 Ga. App. 550, 65 S. E. 308.

50. *Holland v. Chicago, etc., R. Co.*, 139 Mo. App. 702, 123 S. W. 987.

ing an unauthorized diversion of the shipment from the specified route by the second carrier, though the contract purported to limit liability to an agreed valuation.<sup>51</sup> A carrier may not by contract limit the liabilities imposed on it by the Carmack amendment because of the rate charged for transportation.<sup>52</sup> The Carmack amendment does not prevent an agreement limiting a carrier's liability to an agreed valuation in consideration of a reduced rate.<sup>53</sup> Neither the common law nor section twenty of the Interstate Commerce Act, as amended by Act June 29, 1906, section seven, makes illegal or invalid a contract fairly entered into fixing the amount for which a carrier shall be liable in case of loss of property in shipment.<sup>54</sup> The Carmack amendment to the Hepburn Act does not prevent a carrier from making valid contracts limiting liability, according to the agreed value, upon interstate shipments under legal tariff rates.<sup>55</sup> A common carrier may by a contract fairly entered into with a shipper limit the amount of its liability for negligence, and the validity of such a contract is not affected by the fact that the carrier uses printed bills of lading, which fix an arbitrary value for all packages, having no relation to their real value, beyond which it is not to be liable unless a greater value is stated by the shipper and more freight paid, where the facts are fully understood by the shipper who declines to place a valuation on the property.<sup>56</sup>

#### § 4. Limitation of liability.—In general.

The clause in a contract of interstate shipment, limiting the

51. *Drake v. Nashville, etc., R. Co.*, 125 Tenn. 627, 148 S. W. 214.

52. *Central of Ga. Ry. Co. v. Sims*, 169 Ala. 295, 53 So. 826.

53. *McElvain v. St. Louis, & S. F. R. Co.*, 151 Mo. App. 126, 131 S. W. 736.

54. *Missouri Pac. Ry. Co. v. Harper Bros.*, 201 Fed. 671.

55. *Carpenter v. United States Ex-*

*press Co.*, 120 Minn. 59, 139 N. W. 154.

56. *George N. Pierce Co. v. Wells, Fargo & Co.*, 189 Fed. 561, 110 C. C. A. 645, wherein the Circuit Court of Appeals applied the Hart case to a shipment of a carload of automobiles, of the evident value of at least \$15,000, under a bill of lading in which the property was valued at the lump sum of \$50.

liability of the initial carrier to its own lines of railway, contravenes the Act June 29, 1906, § 7.<sup>57</sup> A bill of lading issued after the taking effect of such act for goods to be transported from one State to another is of no effect, in so far as it stipulates a limitation of the carrier's liability to loss occurring on its own line.<sup>58</sup> The liability of an initial carrier is the same whether its contract as issued reads to the end of its own line or to a destination over the lines of connecting carriers.<sup>59</sup> A stipulation in a bill of lading for exemption of the carrier, or any connecting carrier, from liability for loss or damage to goods by fire is without effect, if the fire was due to the negligence of any carrier handling the goods.<sup>60</sup> A stipulation in a contract for an interstate shipment limiting the liability of the initial carrier to loss occurring on its own line is void.<sup>61</sup> A bill of lading is for a through shipment, though it names intermediate lines over which the shipment is to pass, so that the initial carrier can not limit its liability to negligence on its own line.<sup>62</sup> The statute does not prohibit carriers from placing any limitation whatever upon their common-law liability, but merely forbids them from limiting their liability as to damages caused by the respective carrier for which damage a carrier is liable, irrespective of negligence, if it is responsible for the cause

57. *Pecos & N. T. Ry. Co. v. Crews* (Tex. Civ. App.), 139 S. W. 1049.

58. *Southern Pac. R. Co. v. A. J. Lyon & Co.*, 99 Miss. 186, 54 So. 784, overruling suggestion of error, 54 So. 728.

59. *Galveston, etc. Ry. Co. v. Johnson & Johnson* (Tex. Civ. App.), 133 S. W. 725.

60. *Southern Pac. Co. v. Weatherford Cotton Mills* (Tex. Civ. App.), 134 S. W. 778.

61. *Old Dominion S. S. Co. v. C. F. Flanary & Co.*, 111 Va. 816, 69 S. E. 1107.

A stipulation in a bill of lading is-

sued by the initial carrier of an interstate shipment that claims for loss must be made to the agent at point of delivery promptly after the arrival of the goods, and if delayed for more than 30 days after due time for delivery no carrier shall be liable, is a reasonable requirement for the protection of the initial carrier, liable under the Carmack amendment for loss or injury caused by it or any connecting carrier, and must be complied with or the carrier is relieved from liability, unless the stipulation is waived. *Id.*

thereof, so that where the contract of carriage exempted a carrier from liability for loss by fire it could show that the fire occurred from causes beyond its control.<sup>63</sup> The act made invalid all contracts limiting a carrier's liability for loss of freight, and an initial carrier could not contract to limit the liability of a connecting carrier.<sup>64</sup>

### § 5. The purpose and effect of the act.

Prior to the passage of the Carmack Amendment to the Interstate Commerce Act the carrier, when tendered property for transportation from a point in one State to a point in another State, might elect to carry to destination, in which case it necessarily agreed to do so through the agency of other and independent carriers in the line; or, it might elect to carry over its own lines only, and then deliver to the next carrier, who would then become the agent of the shipper. In the first case the receiving or initial carrier's liability as carrier extends over the whole route, for, on obvious grounds, the principal is liable for the acts of its agents. In the other case its carrier liability ends at its own terminal, and its further liability is that of a forwarder. Having this power to make one or the other contract, the only question which has occasioned a conflict in the decided cases was whether the carrier, in the particular case, made the one contract or the other.<sup>65</sup>

As we have shown elsewhere,<sup>66</sup> two different rules have been established by the courts, one known as the English rule, and the other known as the American rule, the weight of authority in the United States sustaining the latter rule, although the former rule

62. *Kemendo v. Fruit Dispatch Co.* (Tex. Civ. App.), 131 S. W. 73.

The initial carrier cannot limit its liability to damages occurring on its own line. *Southern Pac. Co. v. W. T. Meadors & Co.* (Tex. Civ. App.), 129 S. W. 170.

63. *St. Louis S. W. R. Co. of Texas*

*v. Ray* (Tex. Civ. App.), 127 S. W. 281.

64. *Kansas City Southern R. Co. v. Carl*, 91 Ark. 97, 121 S. W. 932.

65. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. —.

66. See Chap. XVII, §§ 8, 9 and 14, *supra*.



is followed by the courts of many of our States. According to the English rule, maintained in England, Canada, and some of the States of the United States, that the liability of the initial carrier extends over the whole route in the absence of express restrictions, the mere receipt of property for transportation to a point beyond the terminus of the line of the receiving carrier, justifies an inference of an agreement for through transportation, and an assumption of full carrier liability by the primary or initial carrier.<sup>67</sup> Upon the other hand, the authorities generally which maintain the American rule, recognized in the United States courts and in the courts of New York and most of the other States, that the liability of the initial carrier is limited to its own line, in the absence of an express contract, have established the rule that the mere acceptance by a carrier of goods for transportation beyond its own line is not sufficient to create, by implication, a contract to carry over the entire route and to establish an undertaking for through liability, but that there must be an express contract.<sup>68</sup> This conflict in the decisions of the courts as to the evidence from which an agreement or contract for through transportation of property to a place beyond the receiving carrier's line might be inferred, created great uncertainty as to the nature and extent of the liability of a carrier receiving goods destined to a point beyond its own line, and in great measure induced the interposition of the regulating power of Congress.

In addition to this, the mutual interests of the transportation companies and the necessities of an expanding commerce led to the almost universal practice of such companies to co-operate in making through routes and joint rates, thus bringing about a situation by which, though independently managed, connecting carriers became in effect one system, with a singleness of charge and continuity of shipment greatly to the advantage of the carrier, and beneficial to the great and growing commerce of the country. But

67. See Chap. XVII, §§ 9 and 14, *supra*.

68. See Chap. XVII, §§ 8 and 14, *supra*.

another practice grew up of receiving carriers refusing to make a specific agreement to transport beyond their own lines, whereby the connecting carriers, for the purpose of carriage, would become the agents of the primary carrier, but the receiving carrier made the rate and route, and as agent of every connecting carrier executed an agreement with the shipper which bound each carrier, "severally, but not jointly," one of the terms of the agreement being that each carrier shall be liable only for loss or damage occurring on its own line. This practice made it most difficult, and often impossible, for shippers, when goods were lost or damaged in transit, to get the necessary evidence as to when and where their property had been lost or damaged, so as to fix liability upon any particular carrier and recover the damages sustained. Upon the other hand, the business association and connection of the carriers afford each facilities for locating primary responsibility as between themselves which the shippers cannot have. This burdensome situation of the shippers demanded regulation by Congress in the public interest.<sup>69</sup>

69. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. —.

The court in the case last cited, among other things, said:

"The common form of receipt, as the court may judicially know, is one by which the shipper is compelled to make with each carrier in the route over which his package must go a separate agreement limiting the carrier liability of each separate company to its own part of the through route. As a result the shipper could look only to the initial carrier for recompense for loss, damage, or delay occurring on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the

packages might and usually did continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment. But here, in turn, he might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged, and had no access to the records of the connecting carriers who, in turn, had participated in some part of the transportation, he was compelled in many instances to make such settlement as should be proposed.

The purpose and indisputable effect of the Carmack amendment is to render and hold the initial carrier engaged in interstate commerce and "receiving property for transportation from a point in one State to a point in another State" as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents, and liable to the holder of the bill of lading for any loss or injury to the property shipped, whether such loss or injury occurred after the goods had passed out of the hands of the initial carrier or not, and to prevent interstate carriers from exempting themselves from liability for the loss of property or damage thereto after it has passed into the hands of another carrier for transportation.<sup>70</sup> The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility. The regulation is also one which facilitates the

This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate. Thus, when this Carmack Amendment was reported by a conference committee, Judge William Richardson, a congressman from Alabama, speaking for the committee of the matter which it sought to remedy, among other things, said:

'One of the great complaints of the railroads has been—and, I think, a reasonable, just, and fair complaint—that when a man made a shipment, say, from Washington, for instance, to San Francisco, California, and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute his suit. The result was that he had to settle his damages at what he could get. What have we done? We have made the initial carrier, the carrier that takes

and receives the shipment, responsible for the loss of the article in the way of damages. We save the shipper from going to California or some distant place to institute his suit. Why? The reasons inducing us to do that were that the initial carrier has a through-route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but that the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the co-operation, the through route courtesies between them, would be broken up if prompt payment were not made. We have done that in conference.' (40 Cong. Rec. Pt. 10, p. 9580.)"

70. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31

remedy of one who sustains a loss, by localizing the responsible carrier, while not imposing an unreasonable burden upon the receiving carrier.<sup>71</sup>

## § 6. Initial interstate carrier cannot limit its liability to its own line.

The effect of the Carmack amendment to the Hepburn Act in respect of carriers receiving property in one State for transportation to a point in another State, and beyond its own lines, is to deny to such an initial carrier the former right to make a contract limiting liability to its own line.<sup>72</sup> In the case cited in the note below, the United States Supreme Court refrained from any consideration of the question as to the right of the initial carrier to refuse a shipment designated for a point beyond its own line, or its right to refuse to make a through route or joint rate when such

Sup. Ct. 164, 55 L. Ed. —; Greenwald v. Barrett, 199 N. Y. 170, 92 N. E. 218.

71. Atlantic Coast Line R. Co. v. Riverside Mills, *supra*.

72. U. S.—Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7.

Ala.—Central of Ga. Ry. Co. v. Sims, 169 Ala. 295, 53 So. 826; Central of Ga. Ry. Co. v. Chicago Varnish Co., 169 Ala. 287, 53 So. 832.

Ark.—Southern Express Co. v. R. H. Meyer Co., 94 Ark. 103, 125 S. W. 642; Chicago, etc., R. Co. v. Miles, 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043; St. Louis, S. W. R. Co. v. Grayson & Seitz, 89 Ark. 154, 115 S. W. 933, carriage of live stock.

Ind.—Pittsburgh, etc., Co. v. Knox, 177 Ind. 344, 98 Ind. 295; Pittsburgh, etc., Ry. Co. v. Mitchell, 175 Ind. 196, 91 N. E. 735.

Minn.—Dodge v. Chicago, etc., R. Co., 111 Minn. 123, 126 N. W. 627.

Miss.—Southern Pac. R. Co. v. A. J. Lyon & Co., 99 Miss. 186, 54 So. 784, 34 L. R. A. (N. S.) 237, overruling suggestion of error, 54 So. 728.

Texas.—Pecos, etc., R. Co. v. Crews (Tex. Civ. App.), 139 S. W. 1049; Southern Pac. Co. v. Weatherford Cotton Mills (Tex. Civ. App.), 134 S. W. 778; Kemendo v. Fruit Dispatch Co. (Tex. Civ. App.), 131 S. W. 73; Southern Pac. Co. v. W. T. Meadors & Co. (Tex. Civ. App.), 129 S. W. 170; International, etc., R. Co. v. Welbourne (Tex. Civ. App.), 115 S. W. 111; Missouri, etc., R. Co. v. Carpenter (Tex. Civ. App.), 114 S. W. 900.

Va.—Old Dominion S. S. Co. v. C. F. Flanary & Co., 111 Va. 816, 69 S. E. 1107.

route and rate would involve the continuance of a transportation over independent lines, on the ground that the record in the case presented no such questions.<sup>73</sup>

## § 7. What law governs.—Jurisdiction of courts.

The jurisdiction of State courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought.<sup>74</sup> A State court may enforce the liability of an initial carrier of an interstate shipment, arising under the Carmack amendment of June 29, 1906, to the Interstate Commerce Act of February 4, 1887, by which such carrier is made liable for a loss beyond its own line.<sup>75</sup> The damage caused by the failure of a connecting carrier in an interstate shipment to deliver the goods to the consignee, for which failure the initial carrier is made liable by the Carmack amendment, is not traceable to a violation of the statute, redress for which, under section nine of the original act, can only be had in the Interstate Commerce Commission or in the Federal courts.<sup>76</sup> The State courts have jurisdiction of actions against an initial carrier for the negligence of connecting carriers, despite sections eight and nine of the original act, which, respectively make car-

73. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. See also, *Smeltzer v. St. Louis, etc., R. Co.*, 158 Fed. 649; *Southern Pac. Co. v. Crenshaw*, 5 Ga. App. 675, 63 S. E. 865; *Welch Lumber Co. v. Norfolk & W. R. Co.*, 137 App. Div. (N. Y.) 248, 121 N. Y. Supp. 985.

74. *Galveston, etc., R. Co. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516, affg. judg. (Tex. Civ. App.), 117 S. W. 169.

75. *Galveston, etc., R. Co. v. Wal-*

*lace, supra*; *Central of Ga. Ry. Co. v. Sims*, 169 Ala. 295, 53 So. 826; *St. Louis, etc., R. Co. v. Heyser*, 95 Ark. 412, 130 S. W. 562, notwithstanding any provision in the contract of carriage to the contrary; *Houston, etc., R. Co. v. Lewis*, 103 Tex. 452, 129 S. W. 594; *Louisville & N. R. Co. v. Warfield & Lee*, 6 Ga. App. 550, 65 S. E. 308; *Southern Pac. Co. v. Crenshaw Bros.*, 5 Ga. App. 675, 63 S. E. 865. *Contra*: See *Drinker on Interstate Commerce Act*, Vol. 1, p. 456.

76. *Galveston, etc., R. Co. v. Wallace, supra*.

riers subject to the provisions of the act liable for damages caused by the doing of certain things, and provide that any person claiming such damages may complain to the Interstate Commerce Commission or bring suit in the Federal courts, for the above sections relate only to the original act.<sup>77</sup> The State courts have concurrent jurisdiction of an action under section twenty of the Interstate Commerce Act, as amended, for injury to goods.<sup>78</sup> The Interstate Commerce Act, section twenty, as amended by the Hepburn Act, section seven, does not limit the jurisdiction of an action against the initial carrier for any loss caused by it or any connecting carrier to the Federal courts, and where the amount involved exceeds \$2,000 such courts and the State courts have concurrent jurisdiction, and where the amount involved is less the State court has exclusive jurisdiction.<sup>79</sup> Where the complaint in an action in a State court against a carrier for delay of an interstate shipment counts on a common law liability, the court has jurisdiction to enforce, in rebuttal of a defense set up under the bill of lading, the provisions of Interstate Commerce Act, section twenty, as amended by the Hepburn Act, section seven.<sup>80</sup>

An action to enforce the liability of initial carriers under the Carmack amendment is not founded on any violation of the Interstate Commerce Act or any of its amendments, and is not brought for the purpose of collecting any penalty incurred in the violation of such act, and is properly brought in a State court.<sup>81</sup> The Interstate Commerce Commission is not a court and cannot try actions for damages to interstate shipments.<sup>82</sup>

77. *Gibson v. Atlantic Coast Line R. Co.*, 88 S. C. 360, 70 S. E. 1030.

78. *Oleovich v. Grand Trunk Ry. Co. of Canada* (Cal. App.), 129 Pac. 290.

79. *Smeltzer v. St. Louis, etc., R. Co.*, 168 Fed. 420; *Fry v. Southern Pac. Co.*, 247 Ill. 564, 93 N. E. 906; *Louisville & N. R. Co. v. Scott*, 133 Ky. 724, 118 S. W. 990. State courts have concurrent jurisdiction. *Shultz*

*v. Skaneateles R. Co.*, 66 Misc. Rep. 9, 122 N. Y. Supp. 445.

80. *Pittsburg, etc., Ry. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735.

81. *Galveston, etc., R. Co. v. F. A. Piper Co.* (Tex. Civ. App.), 115 S. W. 107; *Chicago, etc., R. Co. v. Clements* (Tex. Civ. App.), 115 S. W. 664.

82. *Louisville & N. R. Co. v. Scott*, 133 Ky. 724, 118 S. W. 990.

### § 8. Application of act generally.

State courts take judicial notice of the public acts of the United States, and it is therefore unnecessary for a plaintiff in an action against a carrier brought under the Carmack amendment to the Interstate Commerce Act to plead such Federal statute.<sup>83</sup> The Hepburn Act, June 29, 1906, section seven, relating to the liability of common carriers of property in interstate commerce for loss or damage to such property, but which contains the proviso "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," leaves a shipper free to resort to the laws of a State applicable to his contract.<sup>84</sup> The provision of the act above quoted would seem to reserve all common law remedies, so far as the tribunal and form of action are concerned, to the owner of goods against a defaulting carrier.<sup>85</sup> The provision of the Nebraska constitution, which provides that "the liability of railroad corporations as common carriers shall never be limited," applies to contracts involving interstate commerce, and under such provision, as construed by the Supreme Court of the State, contracts limiting the carrier's liability to a specified sum in consideration of the rate charged are void as to such attempted limitation, and the shipper may recover the actual value.<sup>86</sup> The attorneys' fee taxable as a part of the costs under the Act of Feb. 4, 1887, section eight, where the cause of action is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act, and there is a recovery of damages sustained in consequence of any such violation of the act, may not be taxed to the successful plaintiff in an action by a shipper against an initial carrier for a loss on a connecting line, in which the carrier's

83. *Louisville & N. R. Co. v. Scott*,  
133 Ky. 724, 118 S. W. 990.

84. *Latta v. Chicago, etc., R. Co.*,  
172 Fed. 850.

85. *Shultz v. Skaneateles R. Co.*,

65 Misc. Rep. (N. Y.) 9, 122 N. Y.  
Supp. 445.

86. *Latta v. Chicago, etc., R. Co.*,  
172 Fed. 850.

liability is dependent upon the Carmack amendment of June 29, 1906, since the cause of action is the loss of property which is in no way traceable to the violation of any provision of the statute.<sup>87</sup>

87. Atlantic Coast Line R. Co. v. A. (N. S.) 7, overruling *Riverside*  
*Riverside Mills*, 219 U. S. 186, 31 *Mills v. Atlantic Coast Line R. Co.*,  
Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. 168 Fed. 990.



## CHAPTER XXXIV.

### OFFENSES.—PENALTIES FOR VIOLATION OF REGULATIONS.—INDICTMENTS.—UNDER INTERSTATE COMMERCE ACT.

- SECTION 1. Offenses against the United States.—Nature and elements of crime.
2. Constitutionality of penal and criminal provisions.
  3. Construction of the statute as a penal statute.
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#### § 1. Offenses against the United States.—Nature and elements of crime.

There are no common law offenses against the United States, and the courts of the United States have only such jurisdiction as Congress has conferred on them to try and punish such acts as it

shall have previously declared to be crimes and fixed the penalty therefor.<sup>1</sup> The rule that all persons concerned in the commission of misdemeanors, if guilty, are guilty as principals, and may be indicted tried and convicted as such, is applicable to statutory misdemeanors, whether the aiders and abettors are referred to in the statute or not.<sup>2</sup>

## § 2. Constitutionality of penal and criminal provisions.

Due process of law is not denied by the provisions of the Elkins Act of February 19, 1903, under which the commission by corporate officers, acting within the scope of their employment, of criminal violations of the prohibitions of that Act against giving rebates, is imputed to the corporation, and the corporation is subjected to criminal prosecution therefor.<sup>3</sup> The possible invalidity as to individual carriers of the provisions of the Elkins Act of February 19, 1903, imputing to the carrier the acts, omissions, or failures of the officers and agents of such carrier, acting within the scope of their employment, does not affect the validity of so much of that Act as imputes to corporate carriers the commission by officers and agents of such carriers, acting within the scope of their employment, of criminal violations of the prohibitions of that Act against giving rebates.<sup>4</sup> Neither the Interstate Commerce Act, February 4, 1887, nor the Amendatory Elkins Law, February 19, 1903, is unconstitutional on the ground that in requiring shippers to pay published rates for transportation it deprives them of a natural right to make private contracts in respect thereto, and therefore of their property without due process of law, or on the ground that by authorizing carriers to estab-

1. *United States v. Martin*, 176 Fed. 110; *United States v. Eaton*, 144 U. S. 677-687, 12 Sup. Ct. 764, 36 L. Ed. 591; *United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180; *United States v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259.

2. *United States v. Martin*, 176 Fed. 110.

3. *New York Cent., etc., R. Co. v. United States*, 212 U. S. 481, 53 L. Ed. —, 29 Sup. Ct. 304.

4. *New York Cent., etc., R. Co. v. United States*, *supra*.

lish rates binding on shippers it confers upon them legislative power, or on the ground that it deprives shippers of the right to invoke the judgment of the courts on the reasonableness or unreasonableness of rates, or on the ground that, in making it a criminal act for the shipper to accept rebates, Congress exceeded its power under the commerce clause of the Constitution.<sup>5</sup> The Elkins Act is not unconstitutional as depriving shippers or carriers of property rights without due process of law.<sup>6</sup> The Elkins Act is not unconstitutional as in violation of the fifth amendment to the Constitution because it subjects a shipper to criminal prosecution for accepting a concession from a rate published and filed without permitting him as a defense to show that the established rate was extortionate and unreasonable, and that the rate paid was reasonable.<sup>7</sup>

### § 3. Construction of the statute as a penal statute.

The great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.<sup>8</sup> The statute does not embrace things impossible to be done by a corporation; its objects are to prevent favoritism, and to secure equal rights to all in interstate transportation, and one legal rate,

5. *United States v. Standard Oil Co. of Indiana*, 155 Fed. 305.

6. *United States v. Great Northern R. Co.*, 157 Fed. 288.

7. *United States v. Vacuum Oil Co.*, 158 Fed. 536.

8. *New York, etc., R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 391, 26 Sup. Ct. 272, 50 L. Ed. 515; *United States v. New York Cent., etc., R. Co.*, 212 U. S. 509, 29 Sup. Ct. 313, 53 L. Ed. —.

to be published and posted and accessible to all alike.<sup>9</sup> The object of the Elkins Act was to punish rebates given or received after the passage of the act in respect to property, the subject of interstate transportation, and to make the carrier corporation criminally liable therefor.<sup>10</sup> This act, as well as all other acts upon the same subject, should be so construed and enforced by the courts as to promote their policies and extirpate the evils against which they are directed. Yet in respect to their criminal features this can only be done upon valid indictment, and in accordance with the established principles governing criminal prosecutions.<sup>11</sup> The Elkins Act is highly penal in its character, and while it is the duty of the courts to so construe its terms as to suppress, if possible, the mischief against which it is directed, it is no less their duty to see to it that no person, natural or artificial, shall be held guilty of a crime upon an interpretation of the statute creating it which does not appear with at least a reasonable degree of certainty to be the correct one.<sup>12</sup> While penal statutes must be strictly construed, yet, if the act comes within the spirit and within the reasonable interpretation of the letter of the statute, it is sufficient, though there may be a literal interpretation that might be put on the statute which would not include the case.<sup>13</sup> In answer to the claim that the Act is a penal statute and that all its provisions must be construed pursuant to the strict rules of construction, which are said to be applied in such cases, the commission has said that while the statute contains certain provisions for penalties, in the execution of which the courts will, no doubt, follow the recognized canons of construction, nevertheless the statute as a whole

9. *New York Cent., etc., R. Co. v. United States*, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. —; *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

10. *New York Cent., etc., R. Co. v. United States*, 212 U. S. 509, 29 Sup. Ct. 309, 53 L. Ed. —.

11. *Atchison, etc., R. Co. v. United States*, 170 Fed. 250, 95 C. C. A. 446.

12. *Camden Iron Works v. United States*, 158 Fed. 561, 85 C. C. A. 585.

13. *United States v. Williams*, 159 Fed. 310.

should be regarded as highly remedial in its purpose and scope. It was clearly designed to secure to the public equal and impartial rights and privileges, and to put an end to ancient and well known abuses in the services rendered by common carriers. Such a statute should be construed liberally, fairly, of course, but always with the object in view of reaching as closely as possible the end proposed by the legislative intention, and making the beneficial result desired operative to its greatest available extent.<sup>14</sup>

#### § 4. Summary of the penal and criminal provisions of the statutes.

The following is a summary statement of the various offenses created by the statutes with the penalty prescribed for each offense:

1. *Offense*.—To willfully do or cause to be done, or willingly suffer or permit to be done, any act, matter, or thing prohibited or declared to be unlawful, or to aid or abet therein, or to willfully omit or fail to do any act, matter or thing required to be done, or to cause or willingly suffer to permit any act, matter, or thing directed or required to be done not to be so done, or to aid or abet any such omission or failure, or to be guilty of any infraction of the Act, or to aid or abet therein, is a misdemeanor.<sup>15</sup>

*Penalty*.—Punishable by fine not to exceed \$5,000 for each offense. In case the offense is unlawful discrimination—impris-

14. Re Express Companies, 1 I. C. C. Rep. 349, 1 Int. Com. Rep. 677, 681.

15. Interstate Commerce Act, Section 10, Par. 1, *infra*. This paragraph makes any common carrier subject to the provisions of the Act, or whenever the carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who,

alone or with any other corporation, company, person, or party, commits such offense, liable. The Elkins Act, Section 1, makes the carrier corporation itself as well as its agents, etc., liable. The Amendment of June 18, 1910, Section 10, of the Interstate Commerce Act inserted after the words "shall be guilty of any infraction of this Act," the words "for which no penalty is otherwise provided."

onment in the penitentiary not exceeding two years, or both such fine and imprisonment in the discretion of the court.

2. *Offense*.—To knowingly and willfully assist, or to willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of a common carrier, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, is a misdemeanor.<sup>16</sup>

*Penalty*.—A fine not exceeding \$5,000 or imprisonment in the penitentiary for not exceeding two years, or both, in the discretion of the court, for each offense.

3. *Offense*.—To knowingly and willfully, directly or indirectly, obtain or attempt to obtain transportation for property at less than the regular rates then established and in force, by false billing, false classification, false weighing, false representation of the contents of the package, false report of weight, or by any other device or means, or by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, or to obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with the transportation of property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force, is fraud and a misdemeanor.<sup>17</sup>

16. Interstate Commerce Act, Section 10, Par. 2, *infra*. This paragraph was not altered by the Amendment of June 18, 1910.

17. Interstate Commerce Act, Sec-

tion 10, Par. 3, *infra*. This paragraph was radically changed by the Amendment of 1910 and is now broader and more comprehensive than the paragraph in the original

*Penalty.*—A fine not exceeding \$5,000, or imprisonment in the penitentiary not exceeding two years, or both, in the discretion of the court, for each offense. The penalty of imprisonment, however, does not apply to artificial persons.

4. *Offense.*—For any person, or any officer of a corporation, to induce or attempt to induce any common carrier or its agents to discriminate unjustly in his or its favor as against any other consignor or consignee in the transportation of property, by pay-

**Act.** We give below the Section as it now stands, the matter in italics showing the alterations made:

"Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package (or the substance of the property), false report of weight, (false statement), or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation: or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher,

roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of for agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: *Provided, That the penalty of imprisonment shall not apply to artificial persons.*"

ment of money or other thing of value, solicitation or otherwise, or to aid or abet any common carrier in any such unjust discrimination, is a misdemeanor.<sup>18</sup>

*Penalty.*—A fine of not exceeding \$5,000, or imprisonment in the penitentiary not exceeding two years, or both, in the discretion of the court, for each offense.

5. *Offense.*—The willful failure of any carrier subject to the Acts to file and publish the tariffs or rates and charges as required by the Act, or to strictly observe such tariffs until changed according to law, is a misdemeanor.<sup>19</sup>

*Penalty.*—A fine of not less than \$1,000, nor more than \$20,000.

6. *Offense.*—For any person or corporation, whether carrier or shipper, to knowingly offer, grant, give, solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property whereby any such property shall by any device whatever be transported at a less rate than that named in the published tariffs, or whereby any other advantage is given or discrimination practiced, is a misdemeanor.<sup>20</sup>

*Penalty.*—A fine of not less than \$1,000, nor more than \$20,000, or imprisonment in the penitentiary not exceeding two years, or both, in the discretion of the court.

7. *Offense.*—For any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, or for whom as consignor or consignee, any such carrier shall transport property, to knowingly by employe, agent, or otherwise, directly or indirectly, by or through any means or device whatsoever, to receive or accept from such common carrier any

18. Interstate Commerce Act, Section 10, Par. 4, *infra*. The only change made in this section by the Amendment of 1910 was the insertion of the words "or attempt to induce" after the word "induce." The Elkins Act, Section 1, makes the car-

rier corporation criminally liable for its agents' violations of the Act.

19. Elkins Act, as amended, Section 1, Par. 1, *infra*.

20. Elkins Act, as amended, Section 1, Par. 1, *infra*.



sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates, subject such person or corporation to a forfeiture.<sup>21</sup>

*Penalty.*—Forfeiture to the United States of three times the amount of money so received or accepted and three times the value of any other consideration so received, or accepted, in addition to any penalty provided by the Act.

8. *Offense.*—For any common carrier subject to the provisions of the Act, directly or indirectly, to issue or give any interstate free ticket, free pass, or free transportation for passengers, except as permitted under section 1, Par. 4, or section 22, or for any person, other than the persons excepted in those provisions, to use any such interstate free ticket, free pass, or free transportation, is a misdemeanor.<sup>22</sup>

*Penalty.*—A penalty of not less than \$100 nor more than \$2,000, payable to the United States.<sup>23</sup>

9. *Offense.*—For any common carrier subject to the provisions of the Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose or permit to be acquired by any person or corporation other than the shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or for any person or corporation to solicit or know-

21. Elkins Act, as amended, Section 1, Par. 3, *infra*.

22. Interstate Commerce Act, Sec-

tion 1, Par. 4, *infra*; Section 22, *infra*.

23. See Section —, *infra*, as to whether this penalty is exclusive.

ingly receive any such information which may be so used, is a misdemeanor.<sup>24</sup>

*Penalty.*—A penalty of not more than \$1,000 for each offense, payable to the United States.

10. *Offense.*—For any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, to knowingly fail or neglect to obey any order made under the provisions of section 15 of the Act, subjects such person to a forfeiture.<sup>25</sup>

*Penalty.*—Forfeiture of \$5,000 to the United States for each offense, and in a case of a continuing violation each day shall be deemed a separate offense.

11. *Offense.*—The failure of any carrier, person, or corporation subject to the act to make and file annual reports, or to make specific answer to any question authorized by the provisions of section 20, or to make and file monthly, periodical, or special reports, within the proper time, subjects such persons or corporation to a forfeiture.<sup>26</sup>

*Penalty.*—Forfeiture of \$100 for each day it continues to be in default with respect thereto.

12. *Offense.*—The failure or refusal of any carrier, receiver, or trustee, to keep accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit the same to the inspection of the Commission, or any of its authorized agents or examiners, subject such party to a forfeiture.<sup>27</sup>

*Penalty.*—Forfeiture to the United States of \$500 for each offense and for each day's continuance of such offense.

13. *Offense.*—To willfully make any false entry in accounts,

24. Interstate Commerce Act, Section 15, Pars 6 and 7, as amended by Act of June 18, 1910. This is a new offense created by the Mann-Elkins Amendment of 1910.

25. Interstate Commerce Act, Section 16, Par. 7, *infra*.

26. Interstate Commerce Act, Section 20, Pars. 2 and 3, as amended by Act of June 18, 1910, *infra*.

27. Interstate Commerce Act, Section 20, Par. 6, *infra*.

record, or memoranda kept by a carrier, or willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or to willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or to keep any other accounts, records or memoranda than those prescribed or approved by the Commission, is a misdemeanor.<sup>28</sup>

*Penalty.*—A fine of not less than \$1,000 nor more than \$5,000, or imprisonment not less than one year nor more than three years, or both.

14. *Offense.*—The divulgence by any examiner of facts or information which may come to his knowledge during the course of an examination prescribed by the Commission, subjects such person to a fine.<sup>29</sup>

*Penalty.*—A fine of not more than \$5,000, or imprisonment for a term not exceeding two years, or both.

15. *Offense.*—The neglect or refusal of any person to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, constitutes an offense.<sup>30</sup>

*Penalty.*—A fine of not less than \$100 nor more than \$5,000, or imprisonment for not more than one year, or both.

16. *Offense.*—Failure or refusal of any carrier, receiver, or trustee to comply with any regulation or order of the Commission made under the provisions of section six renders such party liable to a penalty.<sup>31</sup>

*Penalty.*—\$500 for each offense and \$25 for each day's continuance, recoverable by the United States in a civil action.

28. Interstate Commerce Act, Section 20, Par. 7, *infra*.

29. Interstate Commerce Act, Section 20, Par. 8, *infra*.

30. Testimony Act of February 11, 1893, Par. 2, *infra*.

31. Interstate Commerce Act, Section 6, as amended by Act of June

17. *Offense*.—For a carrier to refuse or omit to give a written statement of the rate or charge applicable to a described shipment, after written request therefor made upon its resident agent, or to misstate in writing the applicable rate, renders such carrier liable to a penalty, if the party making such request suffers damages in consequence thereof.<sup>32</sup>

*Penalty*.—A penalty of \$250, recoverable by the United States in a civil action.

### § 5. Rebates, discriminations, and concessions from tariff rates.

A railroad company subject to the Interstate Commerce laws, which paid rebates to a shipper in 1904, is subject to prosecution therefor under the Elkins Act, section one, although the agreement therefor was made before the passage of such act. Such agreement was unlawful and unenforceable under the original Interstate Commerce law, and the rebates cannot be said to have been "given," within the meaning of the Elkins Act, until their actual payment; and, as so construed, the act as applied to such a case is not an *ex post facto* law.<sup>33</sup> It has been repeatedly held that the offense of giving or receiving rebates, in violation of the Elkins Act Feb. 19, 1903, is complete when the carrier, to whom the shipper has paid the full legal rate, pays over to the shipper, upon a claim presented by him, the amount of the rebate stipulated in the agreement under which the shipment was made, or when a part of the legal rate already paid has been refunded.<sup>34</sup>

18, 1910, Sec. 9, Par. 2. This is a new offense created by the Mann-Elkins Act of 1910.

32. Interstate Commerce Act, Section 6, as amended by Act of June 18, 1910, Sec. 9, Par. 3. This is a new offense created by the Mann-Elkins Act of 1910.

33. United States v. Great Northern R. Co., 157 Fed. 288.

34. New York Cent., etc., R. Co. v.

United States, 212 U. S. 481, 500, 29 Sup. Ct. 304, 309, 53 L. Ed. —; Standard Oil Co. of Indiana v. United States, 164 Fed. 376, revg. judg. United States v. Standard Oil Co. of Indiana, 155 Fed. 305, the offense was not complete until the shipper received a rate different from the established rate; United States v. Standard Oil Co., 170 Fed. 988, the receipt of a concession upon payment

The giving or receiving of a rebate or concession whereby property in interstate or foreign commerce is transported at less than the established rate is the essence of the offense denounced by the Elkins Act Feb. 19, 1903; the device by which a rebate is brought about is not an essential element of the crime.<sup>35</sup> A device or contrivance, secret or fraudulent in its nature, is not essential to sustain the conviction of a shipper for violating Elkins Act Feb. 19, 1903, making it a criminal offense for any person to offer, grant, give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall by any device whatever, be transported at less than the carrier's published rates, or whereby any other advantage is given or discrimination practiced.<sup>36</sup> An indictment charging a shipper with securing transportation of goods in interstate commerce at less than the carrier's published rates, in violation of that act, is sufficient where it charges each and all of the elements of the offense, with allegations of time, place, kind of goods, and name of carrier, averring the fixing of the established rate, the changing of the rate, and the new publication, the shipper's knowledge of this change, and the carriage of the goods over a described route at a concession of the difference between the two rates.<sup>37</sup> An indictment against a railroad company for granting rebates in violation

of freight is the completion of the transaction which constitutes the offense. But see *United States v. Vacuum Oil Co.*, wherein it was held that concessions received and accepted on shipments were on the property transported, and not upon the conceded rate, and each shipment on which a concession was given constitutes a separate offense.

35. *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135.

36. *Armour Packing Co. v. United*

*States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, affg. judg. 153 Fed. 1, 82 C. C. A. 135; *Chicago, etc., R. Co. v. United States*, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. Ed. 698, affg. judg. 157 Fed. 830.

37. *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. affg. judg. 153 Fed. 1, 82 C. C. A. 135; *Chicago, etc., R. Co. v. United States*, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. Ed. 698, affg. judg. 157 Fed. 830.

of Elkins Act Feb. 19, 1903, § 1, need not set out a particular description of the device resorted to, but is sufficient where it avers the kind of property shipped, the time and place when and where shipped, the consignee, the existing legal tariff for such shipment, the payment thereof to the shipper, the subsequent payment of the rebate by the carrier to the shipper, and the time and amount of such payment.<sup>38</sup> In a prosecution for giving or accepting a rebate for transportation of property, transportation is clearly an element of the offense.<sup>39</sup> But transportation is not an element of the offense of failing to file an established rate, since a rate is in force before transportation takes place thereunder.<sup>40</sup> And transportation may not be an element of the offense of giving or receiving a rebate or concession "whereby any other advantage is given or discrimination practiced."<sup>41</sup>

#### § 6. Venue of prosecution for giving or receiving rebates, and for false billing, etc.

The offense of obtaining transportation of property in interstate or foreign commerce at less than the carrier's published rates, created by the Elkins Act, Feb. 19, 1903, is a continuous crime, and is made triable in any federal district through which such trans-

38. *Chicago, etc., R. Co. v. United States*, 162 Fed. 835, affg. judg. *United States v. Chicago, etc., R. Co.*, 151 Fed. 84.

See also, *In re Huntington*, 68 Fed. 881, wherein an indictment charging one with issuing a free pass for railroad transportation, contrary to the Act of Feb. 4, 1887, was held fatally defective for failure to allege any use of the pass or transportation under it; *Griffee v. Burlington, etc., R. Co.*, 2 I. C. C. Rep. 301, 2 Int. Com. Rep. 194, where, in a proceeding on complaint charging the illegal issuance of passes, the commission held that the passes in question having never been

used, and no one having ever been transported upon them, the charge of unjust discrimination was not sustained.

39. *New York Cent., etc., R. Co. v. United States*, 166 Fed. 267, 92 C. C. A. 331, revg. judg. *United States v. New York Cent., etc., R. Co.*, 153 Fed. 630. See also, cases cited in preceding notes to this section.

40. *New York Cent., etc., R. Co. v. United States*, *supra*.

41. *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135, judg. affd. 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

portation is had, by the provisions of that Act that violations shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted.<sup>42</sup> The requirement that the prosecution of crimes against the United States be had in the State or district where the offense was committed, which is made by the Sixth Amendment to the Constitution, is not violated by the provision of the Elkins Act, under which the offense of obtaining transportation of goods at less than the carrier's published rates may be tried in any Federal district through which such transportation was conducted.<sup>43</sup> But, under the provisions of the Interstate Commerce Act, section ten, paragraph three, making it an offense to secure the transportation of property by any carrier subject to the act at less than the regular rates by means of false billing, weights, or representations as to the contents of any package delivered to the carrier for transportation, which shall subject the offender to a fine and imprisonment on conviction in any court of the United States of competent jurisdiction "within the district in which such offense was committed," the offense is fully committed by a consignor at the place where the property is delivered for transportation, the false billing made, and the illegal rate secured; and a court of another district, where the property is delivered to the consignee, has no jurisdiction of such offense.<sup>44</sup> Such offense is not one which requires the transportation of the property to its destination before it is complete, and which may therefore, under Rev. St., § 731, be prosecuted either in the district where the shipment is made or in that where it terminates, but the gist of the offense is the fraudulent act by

42. *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, affg. judg. 153 Fed. 1, 82 C. C. A. 135; *Chicago, etc., R. Co. v. United States*, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. Ed. 698, affg. judg. 157 Fed. 830.

43. *Armour Packing Co. v. United States*, *supra*; *Chicago, etc., R. Co. v. United States*, *supra*.

44. *In re Belknap*, 96 Fed. 614. See also, *Armour Packing Co. v. United States*, *supra*; *Chicago, etc., R. Co. v. United States*, *supra*.

means of which the lower rate was obtained, and the offense is complete where such act has been committed, the property delivered for transportation, and the contract for the illegal rate secured, and can only be prosecuted in that district.<sup>45</sup>

**§ 7. Venue of prosecution for failure to file a rate schedule with the Commission.**

The Interstate Commerce Act, Feb. 4, 1887, in force in and prior to 1904, required the filing of schedules of interstate rates with the Interstate Commerce Commission, and the Elkins Act, Feb. 19, 1903, made the willful failure to comply therewith a misdemeanor punishable in any Federal court having jurisdiction of crimes within the district in which the offense was committed. It was held by the Circuit Court of Appeals that the offense of failing to file a rate schedule with the Commission is committed in Washington, where the Commission has its office, and hence must be prosecuted there.<sup>46</sup> The last clause of the provision contained in the Elkins Act, § 1, par. 1, in force in 1904, providing that every violation of the Interstate Commerce Act shall be prosecuted in the district in which the violation was committed or through which the transportation may have been conducted, has no application to a carrier's violation of the Act by failing to file a rate schedule with the Interstate Commerce Commission, transportation being no element of such offense.<sup>47</sup> The Elkins Act of February 19, 1903, § 1, in force in 1904, which provides that if a violation of the Interstate Commerce Act and its amendments occurs in one Federal district and is completed in another, it may

45. *Davis v. United States*, 104 Fed. 136, 43 C. C. A. 448; *United States v. Fowkes*, 49 Fed. 50, 53 Fed. 13, 3 C. C. A. 394, 3 U. S. App. 247, *distinguishing* *In re Palliser*, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514, and *Horner v. United States*, 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126.

46. *New York Cent., etc., R. Co. v. United States*, 166 Fed. 267, 92 C. C. A. 331, *reversing* *United States v. New York Cent., etc., R. Co.*, 153 Fed. 630.

47. *New York Cent., etc., R. Co. v. United States*, *supra*.



be dealt with in either jurisdiction, as though the offense had been actually and wholly committed therein, is applicable only to a "continuing offense," viz., a continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy, and does not apply to a violation of the Act by the carrier's failure to file a rate schedule with the Interstate Commerce Commission.<sup>48</sup>

### § 8. Offenses and courts.—Duplicity.

An indictment under the Elkins Act, Feb. 19, 1903, declaring it unlawful for a carrier to offer, grant, or give a rebate, alleging that defendant offered, granted, and gave a rebate, is not duplicious, but charges but one offense.<sup>49</sup> Where the transaction is completed, the substantive offense is the payment and receipt of the rebate; and an indictment therefore is not bad for duplicity because it also avers the offer or agreement pursuant to which the payment was made.<sup>50</sup> The giving or receiving of a rebate or concession whereby property in interstate or foreign commerce is transported at less than the established rate is the essence of the offense denounced by Act of Feb. 19, 1903, and is a continuous crime within the jurisdiction of any United States court having jurisdiction of crimes through whose district the transportation is conducted.<sup>51</sup> Under the Elkins Act, which makes it unlawful for a shipper to receive "any concession" from the published and filed rate for the interstate transportation of property, where the published rate relates to transportation in car load lots and the shipments are so made, concessions received and accepted on such shipments were upon the property transported, and not upon the conceded rate, and each shipment on which a concession was given

48. New York Cent., etc., R. Co. v. United States, *supra*.

49. United States v. Delaware, etc., R. Co., 152 Fed. 269.

50. United States v. Great Northern R. Co., 157 Fed. 288.

51. Armour Packing Co. v. United States, 153 Fed. 1. 82 C. C. A. 135, *affd.* Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

constitutes a separate offense.<sup>52</sup> So, in case of a violation by a railroad company of Act June 29, 1906, by keeping live stock confined in cars for more than twenty-eight consecutive hours without unloading for rest, water, and feeding, each independent shipment and confinement of stock constitutes the basis for a separate charge, and each separate confinement of the same stock for longer than the prescribed time, although during the same continuous transportation, also constitutes a separate offense.<sup>53</sup> The gist of the offense, under the Elkins Act, prohibiting any person or corporation from receiving any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce, etc., was the receipt of a concession, irrespective of whether the property involved was train loads, car loads, or pounds, and consisted of the "transaction," which was not completed until the shipper received a rate different from the established rate, without reference to the size of the shipment.<sup>54</sup> Rebates cannot be said to have been "given" within the meaning of the Elkins Act, until their actual payment.<sup>55</sup> But an indictment charging a railroad company with the giving of rebates in violation of the Elkins Act, is not demurrable because it avers in separate counts different

52. *United States v. Vacuum Oil Co.*, 158 Fed. 536.

53. *United States v. Southern Pac. Co.*, 157 Fed. 459.

Where several shipments of live stock, belonging to different owners, are contained in the same train, and the carrier fails to unload, as provided in such act, a penalty is recoverable for each shipment, the shipment, and not the train load, being the integer contemplated as the objective thing to which the offense relates. *United States v. Baltimore, etc., R. Co.*, 159 Fed. 33. 86 C. C. A. 223.

54. *Standard Oil Co. of Indiana v.*

*United States*, 164 Fed. 376, revg. judg. *United States v. Standard Oil Co. of Indiana*, 155 Fed. 305, which held that each shipment made at the illegal rate constituted a separate offense.

Where defendant was indicted for receiving a concession, rebate, and discrimination on 20 shipments of lumber, but it appeared that there were only 6 rebate settlements with the carrier, defendant was guilty of but 6 offenses. *United States v. Stearns Salt & Lumber Co.*, 165 Fed. 735.

55. *United States v. Great Northern R. Co.*, 157 Fed. 288.

agreements for the granting of rebates to the same shipper and the payment of all of such rebates on the same day; it not appearing therefrom that there was but a single payment.<sup>56</sup> In a prosecution against a shipper for receiving concessions from the published rates of a railroad company in violation of the Elkins Act, which involves continuous shipments covering a number of years, there can be no greater number of offenses than there were payments of freight, in which concessions were granted and received, such receipt being the completion of the transaction which constitutes the offense.<sup>57</sup> Section one of the Elkins Act, Feb. 19, 1903, in providing that "it shall be unlawful for any person, persons or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce," etc., describes three separate and distinct correlative offenses on the part each of carrier and shipper; and, to warrant a conviction of a shipper for receiving rebates, the fact of the payment of such rebate by or on behalf of the carrier, and its receipt by or on behalf of the defendant, must be proved, and each payment constitutes but one offense, although it may cover more than one shipment.<sup>58</sup> Where defendant shipped oil at concession rates on prepaid shipping orders, making settlements with the carrier periodically, there were as many offenses committed on a settlement being made as there were separate transactions or transportations covered by such settlement.

### § 9. Parties criminally liable.—Joinder of parties.

Both the corporation and its agents may be joined in an indictment for violating the provisions of Elkins Act, Feb. 19, 1903, against rebates, under which the commission by corporate officers

56. *United States v. General Vermont Ry.*, 157 Fed. 291.

57. *United States v. Standard Oil Co.*, 170 Fed. 988.

58. *United States v. Bunch*, 165

Fed. 736. See also, *United States v. Stearns Salt & Lumber Co.*, 165 Fed. 735.

59 *United States v. Standard Oil Co. of New York*, 192 Fed. 438.

or agents, acting within the scope of their employment, of criminal violations of the provisions of the act, is imputed to the corporation, and the corporation subjected to criminal prosecution therefor.<sup>60</sup> Shippers and their agents may also be joined in such indictments.<sup>61</sup> A consignee, no less than the consignor, is chargeable with a violation of section one of the Elkins law by receiving rebates or concessions from the published tariffs of an interstate carrier through the cancellation of terminal charges at the point of destination which form a part of the tariffs so published.<sup>62</sup> The giving by a private car company which delivers its cars to railroad companies to be furnished indiscriminately for the use of shippers, receiving pay for such use from the railroad companies on a mileage basis, of any rebate or allowance to a shipper using its cars, whereby he secures the transportation of his property at a less rate than that named in the published tariff of the carrier for transportation of such property in its own cars, although from its own funds and without the connivance or knowledge of the carrier, is a violation of the Elkins Act, Feb. 19, 1903.<sup>63</sup> Where a common carrier issued an interstate free pass to an employee, and said employee delivered the pass to a person not authorized by statute to receive or use it, and the latter used it on an interstate journey, he violated Act June 29, 1906, and the employee delivering to said person such pass is guilty of aiding and abetting in said violation.<sup>64</sup> A receiver, not being bound to continue contracts made before his

60. *New York Cent., etc., R. Co. v. United States*, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. —, aff'g judg. *United States v. New York Cent., etc., R. Co. v. United States*, 146 Fed. 298.

61. *United States v. New York Cent., etc., R. Co.*, 146 Fed. 298.

62. *United States v. Standard Oil Co.*, 148 Fed. 719.

63. *Interstate Commerce Commission v. Reichmann*, 145 Fed. 235.

64. *United States v. Williams*, 159 Fed. 310.

One who, having in his possession an interstate free pass, sells it to another, knowing that he is not the person named therein, and is not entitled to ride thereon, with intent that he shall so use it, which he does by riding on an interstate journey, is guilty of using the ticket in violation of the statute. *United States v. Martin*, 176 Fed. 110.

appointment, is not criminally liable, under section six of the Interstate Commerce Act, for the violation of a joint tariff previously established by the railroad company of which he is receiver and another company, and which he has not ratified, adopted, or recognized in any way.<sup>65</sup> The fact alone that defendant is a stockholder in a corporation which has accepted rebates in violation of law does not render him subject to the penalty imposed by the statute therefor.<sup>66</sup> Where an unlawful arrangement was made by the assistant general freight agent, the fact that the local freight agent, and the agent who made out the bills of lading, knew that there was something unusual and out of the ordinary course of business in such shipments, is not sufficient notice to them that the company was violating the Interstate Commerce Act to make them criminally liable therefor.<sup>67</sup> An agent of a railroad, who merely collects freights, and has nothing to do with fixing them, is not indictable for a violation of the long and short haul clause of the Interstate Commerce Act.<sup>68</sup> The fact that the shipper who contracts for and receives a rebate in violation of the statute receives no benefit therefrom, but turns the same over without consideration to another, does not relieve him from criminal liability.<sup>69</sup> Where a carrier is a corporation, not only the carrier itself, but the officers individually, are subject to indictment for violation of the Interstate Commerce Act, February 4, 1887.<sup>70</sup> The rule that all persons concerned in the commission of misdemeanors if guilty are guilty as principals, and may be indicted, tried, and convicted as such, is applicable to statutory misdemeanors, whether the aiders and abettors are referred to in the statute or not.<sup>71</sup>

65. *United States v. De Coursey*, 82 Fed. 302.

66. *United States v. Wood*, 145 Fed. 405.

67. *United States v. Michigan Cent. R. Co.*, 43 Fed. 26.

68. *United States v. Mellen*, 53 Fed. 229.

69. *United States v. Wood*, 145 Fed. 405.

70. *In re Pooling Freights*, 115 Fed. 588.

71. *United States v. Martin*, 176 Fed. 110.

### § 10. Criminal intent or knowledge.

While intent is, in a certain sense, essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases, within which a violation of the Elkins Act, making it a criminal offense for any person or corporation "to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at less than the carrier's published rates, or whereby any other advantage is given or discrimination practiced," falls, where intentionally giving or accepting transportation of goods in interstate or foreign commerce at less than the carrier's published rates is sufficient to sustain a conviction, although such action may have been taken in good faith, under a claim of legal right, and in the honest belief that it was lawful.<sup>72</sup> In a prosecution of an interstate carrier for giving a rebate on an interstate shipment, constituting a departure from the established rate, in violation of the Elkins Act, denouncing such departure when willfully made, the intention with which such departure was so made is of the essence of the offense.<sup>73</sup> But the criminal intent required to be shown is an intention to do an act which violates the law, that the intention with which the act was done was to perform an illegal or criminal act.<sup>74</sup> In a case arising prior to the Hepburn amendment of 1906, it was held that a shipper cannot be convicted of accepting a concession from the lawfully published rate without proof of knowledge of what such rate in fact was;

72. *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, aff'd judg. 153 Fed. 1, 82 C. C. A. 135; *United States v. New York Cent., etc., R. Co.*, 146 Fed. 298.

73. *Atchison, etc., R. Co. v. United States*, 170 Fed. 250, 95 C. C. A. 446, rev'g judg. *United States v. Atchi-*

*son, etc., R. Co.*, 163 Fed. 111, and evidence was admissible as showing absence of the carrier's intent to grant a concession from the established freight rate.

74. *New York Cent., etc., R. Co. v. United States*, 212 U. S. 481, 500, 29 Sup. Ct. 304, 309, 53 Ed. —, aff'g judg. 146 Fed. 298.

and hence evidence that the shipper had no knowledge of the published rate, and could only have ascertained the same by construction of several tariff sheets, the application of which was questionable, was admissible.<sup>75</sup> The amendment of 1906 inserted in the statute the word "knowingly." The use of the word "willful" in Elkins Act, Feb. 19, 1903, section one, to characterize offenses thereunder, conceding it to apply to the granting of rebates from the published schedule rates, it was also held, does not require that there should have been an evil intent to constitute the offense, but it is sufficient if the act was done knowingly and purposely.<sup>76</sup> An indictment is good, even though it does not allege that the defendants, when the shipments were made, intended to charge less than the schedule rate.<sup>77</sup> The only criminal intent requisite to a conviction of an offense created by statute which is not *malum in se* is the purpose to do the act in violation of the statute.<sup>78</sup> To sustain a conviction of a shipper for receiving rebates, in violation of section one of the Elkins Act, the fact of the payment of such rebate by or on behalf of the carrier, and the receipt of it by or for the use and benefit of the defendant, must be proved, and each payment constitutes but one offense, although it may cover more than one shipment.<sup>79</sup> Where a grain company made certain shipments of grain over defendant's road to the grain company's brokers, who received the consignments, paid the freight, and afterwards sold the grain for the shipper's account, and thereafter the

75. Standard Oil Co. of Indiana v. United States, 164 Fed. 376. revg. judg. United States v. Standard Oil Co. of Indiana, 155 Fed. 305.

76. Chicago, etc., R. Co. v. United States, 162 Fed. 835, aff'g judg. United States v. Chicago, etc., R. Co., 151 Fed. 84, and it was no defense to a prosecution therefor that competing roads granted a like concession, and that it was compelled to do the same in order to secure its

fair share of the business, or that it treated all shippers alike, or that the concession was made by its officers in good faith and in the honest belief that it was lawful.

77. United States v. Hanley, 71 Fed. 672.

78. Armour Packing Co. v. United States, 153 Fed. 1, 82 C. C. A. 135.

79. United States v. Bunch, 165 Fed. 736.

grain company presented to defendant the receipted freight bills paid by the consignees with other papers, on which defendant, according to a pre-existing agreement, refunded elevator charges to the grain company, defendant at the time it paid such rebate had actual knowledge that the freight had been paid by the consignees acting for the grain company, and such facts therefore sustained an indictment charging the railroad company with paying a rebate to the grain company from freight charges before then "received from the grain company."<sup>80</sup> Under the Act of June 29, 1906, requiring interstate carriers to publish a schedule of freight rates and make their charges accordingly, and Interstate Commerce Act, Feb. 4, 1887, as amended by Act March 2, 1889, making it a fraud for a shipper to obtain a preference in knowingly making a shipment under a false billing, where a shipper, innocent at the time and ignorant of any classification or differences in rates, shipped a race horse and paid the charge made by the agent without being informed of the valuation made, a contention that recovery is forbidden by the statute of 1906 because indirectly giving a preference in rating forbidden by the law cannot be sustained.<sup>81</sup>

**§ 11. Rebates from joint tariff.—Liability of carrier not publishing or filing the rate.**

It was held by the Circuit Court that section one of the Elkins Act, Feb. 19, 1903, sets forth two entirely separate offenses, the first being the failure of a carrier, subject to the provisions of the Interstate Commerce Act, to file and publish the tariff required by said act or strictly to observe the same, and second, the giving or receiving of any rebate whereby any property "shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier," and that, in order

<sup>80</sup>. Wisconsin Cent. Ry. Co. v. <sup>81</sup>. Kessenger v. Fitzgerald, 152 United States, 169 Fed. 76, 94 C. C. 7, N. C. 247, 67 S. E. 588. A. 444.



to constitute an offense under the second provision, the tariff charged to have been violated must be one published or filed by the defendant charged, and it is not sufficient that in the case involved such defendant participated in a through rate published and filed by another carrier, where it had not itself published or filed it.<sup>82</sup> The Supreme Court, however, in view of the fact that the Elkins Act, *inter alia*, provides that the published rate shall be conclusively deemed, in any prosecution under the act, to be the legal rate as against the carrier who files the same or "participates in any rates so filed or published," and that any departure from such rate shall be deemed to be an offense under the act, reversed the decision of the lower court and held that a carrier which gives rebates from a joint rate on file with the Interstate Commerce Commission may, although it did not itself publish and file the rate, be convicted of violating the act.<sup>83</sup> The Circuit Court of Appeals held that a carrier's participation in the transportation of property under through bills of lading issued by a connecting carrier and in the rate charged therein filed and published by such connecting carrier was not under a "common arrangement" between the carriers with respect to such shipment within the meaning of the act so as to make such rate the lawful rate as against the shipper, nor to render the latter subject to criminal prosecution for receiving a rebate under the Elkins Act, Feb. 19, 1903, section one, from such participating carrier's portion of such rate, where such rate was not filed or expressly concurred in by it.<sup>84</sup>

It is not essential to the commission of the offense of giving a concession from a through rate over connecting lines of railroad,

82. *United States v. New York Cent., etc., R. Co.*, 157 Fed. 293.

83. *United States v. New York Cent., etc., R. Co.*, 212 U. S. 509, 29 Sup. Ct. 313, 53 L. Ed. —, rev'g judg. 157 Fed. 293. The provision making the published rate conclusive evidence, etc., is not to be construed, as in the lower court and in *United*

*States v. Camden Iron Works*, 150 Fed. 214, as one relating merely to evidence, but as establishing a substantive offense.

84. *Camden Iron Works v. United States*, 158 Fed. 561, 85 C. C. A. 585, rev'g *United States v. Camden Iron Works*, 150 Fed. 214.

The Elkins Act of Feb. 19, 1903,

under Elkins Act, Feb. 19, 1903, that the rate be a joint one established by all the carriers and published and filed with the Interstate Commerce Commission. If an initial carrier accepts traffic for transportation, and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the Commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the Commission, the lawful through rate to be charged is the sum of the local and joint rates.<sup>85</sup> In the concert of action, in the successive receipt and movement of traffic by connecting carriers under through bills of lading for continuous carriage, is manifested the common arrangement contemplated by the Interstate Commerce Laws, and no previous formal contract is necessary to bring the carriers under the provisions of the law.<sup>86</sup> The acceptance by an initial carrier of a through shipment to be carried at less than the lawful rates is not rendered lawful by the fact that such carrier had a contract with a connecting carrier whose line formed a part of the through route that the latter would not increase its rate during a certain time and on the faith of such contract made a similar contract with the shipper, where in the meantime the connecting carrier had in fact published and filed with the Commission a new schedule increasing the rate.<sup>87</sup> A car-

makes it unlawful for a carrier to grant a rebate from a joint tariff rate which it has filed with the Interstate Commerce Commission or published, or in which it participates when filed or published by another carrier, but it does not make it a criminal offense to receive a rebate from a joint rate unless such rate has been both filed and published. *United States v. Wood*, 145 Fed. 405.

<sup>85.</sup> *Chicago, etc., R. Co. v. United*

*States*, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. Ed. 698, aff'g judg. 157 Fed. 830.

<sup>86.</sup> *Chicago, etc., R. Co. v. United States*, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. Ed. 698, aff'g judg. 157 Fed. 830.

<sup>87.</sup> *Chicago, etc., R. Co. v. United States*, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. Ed. 698, aff'g judg. 157 Fed. 830.

rier which accepts and carries an interstate shipment on a through bill of lading, openly charging the sum of the published local rates between the points named therein, thereby creates a through rate and accepts the published aggregate as the lawful through charge; and any rebate given therefrom is a violation of the Elkins Act, section one.<sup>88</sup>

#### § 12. Judgment for giving rebates abated by death of the accused.

Where accused was convicted of giving rebates, in violation of the Interstate Commerce Act and its amendments, and sentenced to pay a fine, but died after judgment had been entered against him and before the fine was paid, the judgment and entire proceedings abated on his death, and it was not a claim enforceable against his personal representatives.<sup>89</sup> The court in which the judgment was rendered had jurisdiction to abate the proceedings, on the motion of decedent's personal representatives, on notice to the government.<sup>90</sup>

#### § 13. Free passes as a preference or discrimination.

By the provision of Hepburn Act, June 29, 1906, section one, amendatory of Interstate Commerce Act, Feb. 4, 1887, section one, that "the term 'common carrier' as used in this act shall include express companies," such companies are made subject to all provisions of said Interstate Commerce Act and its amendments, so far as the same may be applicable, to the same extent as though they had been named in the original act, including the provisions of sections two and three against unjust and unreasonable discriminations, of section six, as amended by the Hepburn Act, prohibiting the taking of any greater or less sum for transportation of property than that named in the tariffs filed, and of section one of the Elkins Act, as so amended, making it unlawful to offer or

88. *United States v. Great Northern R. Co.*, 157 Fed. 288.

89. *United States v. Pomeroy*, 152 Fed. 279. (U. S. C. C. N. Y., 1907).

90. *United States v. Pomeroy*, *supra*.

accept any rebate from the published rate, or other discrimination in respect of the transportation of any property whereby any advantage is given.<sup>91</sup>

#### § 14. Transporting without a filed rate.

That effective railroad rate regulation must begin with publicity of rates is one of the principles upon which the Interstate Commerce Act was based. The penalty for failure on the part of any carrier subject to the Act<sup>92</sup> to publish and file its rates is as severe as the penalty for failure to observe such rates after filing.<sup>93</sup> By the amendment of June 29, 1906, section six of the Act to Regulate Commerce was rewritten, and still further strengthened. The transportation of passengers or property in interstate commerce by any carrier which had not filed its rates for such service in accordance with the Act was made a misdemeanor. The Elkins Act at the same time was also amended by addition of the penalty of imprisonment for individuals. Prior to the Act of June 29, 1906, such a prosecution could not have been maintained. It is now an offense to transport without a filed rate as well as to fail to file the rate.<sup>94</sup> Transportation of interstate commerce by a carrier

91. *United States v. Wells-Fargo Express Co.*, 161 Fed. 606.

92. In *United States v. Illinois Terminal R. Co.*, 168 Fed. 546, the line of the defendant railway was entirely within the state of Illinois. The defendant, although really no more than a switching road connecting various railways with each other and with various industries established upon its rails, was, however, engaged in the transportation of property moving wholly by railroad from one state to another state. It was held, therefore, as much subject to the Act to Regulate Commerce as it would be if it owned and operated all the line of railroad con-

necting the points in different states between which moved the commodities mentioned in the indictment. See *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 650, 20 Sup. Ct. 209, 44 L. Ed. 309; *United States v. Colorado & N. W. R. Co.*, 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167; *Belt Ry. of Chicago v. United States*, 168 Fed. 542.

93. Section 1 of the Elkins Act makes it a misdemeanor, punishable by a fine of not less than \$1,000, nor more than \$20,000, for each offense.

94. *New York Cent., etc., R. Co.*

which has neglected to file and publish its rates and charges for such service is a misdemeanor, under the Act to Regulate Commerce, Feb. 4, 1887, as amended by Act June 29, 1906, and under the Elkins Act. The requirement for filing and publication has been in the Act ever since the passage of the original Cullom bill, and its importance has been recognized by Congress by successive amendments designed to make it more precise and its violation more surely and more severely punishable.<sup>95</sup>

Under Interstate Commerce Act, Feb. 4, 1887, § 6, as amended by Act June 29, 1906, § 2, which declares that every common carrier subject to the act shall file with the Interstate Commerce Commission and print, post, and keep open to public inspection schedules showing rates, fares, and charges for transportation between different points on its own route and points on the route of any other carrier by railroad, etc., in a prosecution against certain interstate carriers for shipping certain freight at a 10-cent rate, when the published and filed rate was 15 cents per hundred-weight, evidence that the 10-cent rate had been published by defendant's connections and sent "broadcast," though not filed, was inadmissible as a matter of defense, since the charging of a rate less than the filed rate constitutes a concession to the shipper, in violation of the act, as a matter of law.<sup>95a</sup>

### § 15. False billing, classification, weighing, false representation of contents of package, etc.

Section 10, paragraph 3, of the Interstate Commerce Act, makes it a misdemeanor for any person, for himself, or as an officer or

v. United States, 166 Fed. 267; United States v. Illinois Terminal R. Co., 168 Fed. 546.

95. United States v. Illinois Terminal R. Co., *supra*.

95a. United States v. Merchants' & Miners' Transp. Co., 187 Fed. 363.

In a prosecution of an interstate carrier for shipping freight at a

rate less than that filed with the Interstate Commerce Commission, defendant could not be heard to say that it did not know of the filed rate, which it had established in accordance with the law, as a justification for its departure therefrom *Id*.

agent of any corporation or company, who shall deliver property for transportation to any person, for himself, or as an officer or agent of any corporation or company, who shall deliver property for transportation to any common carrier, subject to the provisions of the Act, or for whom as consignor or consignee any such carrier shall transport property, to obtain transportation for such property at less than the regular rates, by means of false billing, classification, or weighing, or false representation of the contents of the package, etc., and provides for prosecution of the offense in any court of the United States of competent jurisdiction "within the district in which such offense was committed." Such an offense is not one which requires the transportation of the property to its destination before it is complete, and which may therefore, under Rev. St. § 731, be prosecuted either in the district where the shipment is made or in that where it terminates, but the gist of the offense is the fraudulent act by means of which the lower rate is obtained, and the offense is complete where such act has been committed, the property delivered for transportation, and the contract for the illegal rate secured, and can only be prosecuted in that district.<sup>96</sup> The receipt by a shipper of a rebate from the carrier upon previous shipments is not within the provisions of the Interstate Commerce Act making it unlawful for a shipper by false billing, classification, weighing, representations of the contents of a package, report of its weight, or other device or means, to obtain transportation for less than the regular rates.<sup>96a</sup> Under the clause of the Interstate Commerce Act, making it unlawful for a carrier, by means of false billing, classification, weighing, or by any other device or means, to suffer or permit any person to obtain transportation at less than the regular rates, an indictment will not lie for paying or receiving rebates.<sup>97</sup> Some

96. *Davis v. United States*, 104 Fed. 136, 43 C. C. A. 448; *In re Belknap*, 96 Fed. 614. See also *Armour Packing Co. v. United States*, 153

Fed. 1, 82 C. C. A. 135. affirmed 209 U. S. 56, 75, 28 Sup. Ct. 428, 52 L. Ed. 681.

97. *United States v. Hanley*, 71

fraudulent device on the part of the shipper is essential in either case.

### § 16. Conspiracies to commit crime.

Under the Elkins Act of February 19, 1903, as it stood until 1906, abolishing imprisonment as a punishment for offenses committed against the Acts regulating interstate commerce, an indictment alleging that the agents of a shipper and the agents of a railroad company engaged in interstate commerce stipulated to give and receive rebates on the transportation of property, and thereafter gave and received such rebates in pursuance of such fraudulent conspiracy, merely alleged a violation of the Interstate Commerce Act as amended by the Elkins Act, and was therefore not sustainable as alleging a conspiracy to commit an offense against the United States, punishable by imprisonment, under Revised Statutes, § 5440.<sup>98</sup> A conspiracy to induce the giving or receiving of rebates in violation of the Elkins Act of February 19, 1903, is punishable under Revised Statutes, § 5440, where the persons charged are not limited to the giver and receiver of the rebate alone.<sup>99</sup> The Hepburn Act June 29, 1906, which makes it criminal to issue or use any interstate free transportation, except as to certain classes of persons, does not apply unless the person to whom the transportation is issued uses the same; and hence an indictment will lie, under Rev. St. § 5440, for conspiracy to commit an offense against an agent of a railroad company and others, to whom he issues interstate free passes, and who, pursuant to agreement, sell the same for use by others not within the excepted classes.<sup>1</sup> A combination to induce the officers of a

Fed. 672. See *Davies v. Pere Marquette R. Co.*, 10 I. C. C. Rep. 405.

Goods incorrectly described in good faith are not "falsely described" goods within the meaning of the Interstate Commerce Act, so as to impose the penalties imposed therefor.

*Atchison, etc., R. Co. v. Goetz & Brada Mfg. Co.*, 51 Ill. App. 151.

98. *United States v. New York Cent., etc., R. Co.*, 146 Fed. 298.

99. *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477.

1. *United States v. Clark*, 164 Fed.

common carrier corporation subject to the provisions of the Interstate Commerce Act, and its locomotive engineers, to refuse to receive, handle, and haul interstate freight from another like common carrier in order to injure the latter, is a combination or conspiracy to commit the misdemeanor described by section 10 of the Interstate Commerce Act; and, if any person engaged in it does an act in furtherance thereof, all combining for the purpose are guilty of criminal conspiracy, as denounced by Rev. St. § 5440.<sup>2</sup> Where an indictment, under Rev. St. § 5440, for a conspiracy to commit the offense created by section 10 of the Interstate Commerce law, as amended by Act March 2, 1889, charges a conspiracy between lumber merchants and their servants and an employe of a railroad company to procure less than the established rates by falsely weighing the lumber shipped, such weighing being done by the railroad employe, the jury, in order to convict, must find an agreement between two or more of the defendants for the purpose named, and also, as an overt act, the actual false weighing of lumber by such employe.<sup>3</sup> A combination of locomotive engineers, which will have the effect to defeat the provisions of the Interstate Commerce Act, inhibiting discriminations in the transportation of freight and passengers, and further to restrain the commerce of the country, will be obnoxious to the penalties prescribed in Rev. St. § 5440.<sup>4</sup>

### § 17. Offenses prosecuted by information.

In a prosecution under Act Feb. 19, 1903, for giving and receiving rebates, it was held that offenses against the United States punishable by a fine or by imprisonment not in a State prison or penitentiary are not infamous, within the meaning of the fifth

75. and such agent cannot assert that his principal had no knowledge of the issuance of the pass, and therefore committed no offense.

2. Toledo, etc., Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A.

387.

3. United States v. Howell, 56 Fed. 21.

4. Waterhouse v. Comer, 55 Fed. 149, 19 L. R. A. 403.



constitutional amendment, and any such offense may be prosecuted by information.<sup>5</sup>

### § 18. Indictments.

An indictment charging a shipper with securing transportation of goods in interstate or foreign commerce at less than the carrier's published rates, in violation of Elkins Act February 19, 1903, is sufficient where it charges each and all of the elements of the offense, with allegations of time, place, kind of goods, and name of carrier, averring the fixing of the published rate, the changing of the rate, and the new publication, the shipper's knowledge of this change, and the carriage of the goods over a described route at a concession of the difference between the two rates.<sup>6</sup> A device or contrivance, secret or fraudulent in its nature, is not essential to sustain the conviction of a shipper for violating the Elkins Act Feb. 19, 1903, making it a criminal offense for any person or corporation to offer, grant, solicit, give or to accept or receive any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at less than the carrier's published rates, or whereby any other advantage is given or discrimination practiced;<sup>7</sup> and it is unnecessary to plead it in the indictment.<sup>8</sup> The offense of giving rebates in violation of the Elkins Act is complete when the carrier, to whom the shipper has paid the full legal rate, pays over to the shipper, upon a claim presented by him, the amount of the

5. *United States v. Camden Iron Works*, 150 Fed. 214.

6. *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, affg. judg. 153 Fed. 1, 82 C. C. A. 135; *Chicago, etc., R. Co. v. United States*, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. Ed. 698, affg. judg. 157 Fed. 830.

7. *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, affg. judg. 153 Fed. 1, 82 C. C. A. 135; *Chicago, etc., R. Co. v. United States*, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. Ed. 698, affg. judg. 157 Fed. 830.

8. *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135.

rebates stipulated in the shipping agreement.<sup>9</sup> An indictment of a shipper for rebates or concessions, in violation of the Elkins Act, which charges that defendant received a concession from such rates on a specified shipment, is sufficiently specific and need not specifically charge the actual payment of the unlawful lower rate, which is a matter of proof.<sup>10</sup> In an indictment based on section 1 of the Elkins Act charging an interstate carrier with the giving of rebates, where it is averred that defendant received the legal rate, and granted and paid to the shipper a certain rebate or concession, whereby it transported the property shipped at less than the legal rate, it is not necessary to allege a prior agreement for such rebate, nor need the indictment negative the existence of conditions or circumstances which might render the payment legal; that being a matter of defense.<sup>11</sup>

An indictment for violation of section 1 of the Elkins Act, for giving or receiving rebates, need not allege that the carrier's published rate was a reasonable one, nor set out its tariffs in full, it being sufficient to aver that a certain named rate was in force between designated points as shown by the published tariffs.<sup>12</sup> An indictment charging a shipper with having received a rebate or concession from the joint rate published and filed by the carrier is not defective because it does not specifically charge that such rate

9. *New York Cent., etc., R. Co. v. United States*, 212 U. S. 481, 29 Sup. Ct. 304, 52 L. Ed. —, affg. judg. *United States v. New York Cent., etc., R. Co.*, 146 Fed. 298.

10. *Standard Oil Co. of New York v. United States*, 179 Fed. 614, 103 C. C. A. 172.

11. *United States v. Chicago, etc., R. Co.*, 151 Fed. 84.

An indictment for receiving rebates in violation of section 1 of the Elkins Act, which charges that there was an arrangement between several carriers having connecting lines for the

continuous transportation of property over such lines between certain points, and that the lowest total rate as shown by the published tariffs of the several carriers was a certain sum per hundred pounds on a particular product, but that such product was transported for defendant at a lower rate, is bad, in that it does not negative the existence of a joint through rate lower than the total of the local rate. *United States v. Standard Oil Co.*, 148 Fed. 719.

12. *United States v. Standard Oil Co.*, 148 Fed. 719.

was required to be filed by the statute, where it alleges that it was published and filed as required by law, nor because it does not charge that the defendant solicited the concession, nor need it name any other shipper who has been charged and paid the higher rate, as is required where discrimination is charged, or that any shipment was actually made at the published rate.<sup>13</sup> Where in a prosecution against a carrier for discrimination in violation of the Interstate Commerce law, Act Feb. 4, 1887, the indictment alleged that a common arrangement existed between defendant and three other connecting carriers named for a continuous forwarding of property, in interstate commerce, between two specified points, and that defendant kept open for public inspection its printed tariff of rates, and filed the same as required by law, with the allegation that the shipment in question was accompanied by written shipping orders, way bills, and transfer slips showing a continuous shipment between such points, it sufficiently charged the establishment of a joint tariff of rates for the commodity in question, without alleging that all the connecting carriers concurred in such joint rate, or that it was filed with the Interstate Commerce Commission by their joint action.<sup>14</sup> An information for receiving rebates in violation of Act Feb. 19, 1903, on an interstate or foreign shipment made partly by railroad and partly by water, need not expressly aver that the connecting carriers are used under a common control, management, or arrangement for a continuous service, etc., so as to bring them within the terms of the Interstate Commerce Law Feb. 4, 1887, where it sets out facts which show that such was the case in respect to the shipment in question.<sup>15</sup>

An indictment under section 2 of the Interstate Commerce Act,

13. *United States v. Vacuum Oil Co.*, 153 Fed. 598, holding also that because the indictment alleges that the shipment was made in car load lots, or in cars not owned by the carriers, it does not follow as matter of law that such fact justified the de-

parture from the published rate so as to render the indictment demurrable.

14. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

15. *United States v. Camden Iron Works*, 150 Fed. 214. *judg. revd.* *Camden Iron Works v. United States*,

which fully and amply alleges all the details of time, place, distance, amount, and kind of freight transported for one person, and then charges that the service was for a less transportation than was received from another person, "for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," sufficiently describes the services rendered.<sup>16</sup> The defense of "unjust discrimination, under section 2, is not confined to discrimination by means of some device, as by a special rate, rebate, or drawback, but is committed by directly giving different rates to different persons, and an indictment under that section need not aver by what particular device the discrimination was accomplished.<sup>17</sup> In an indictment under section 3 it is not necessary to allege that the discrimination was committed "under substantially similar circumstances and conditions," it being sufficient to show with

158 Fed. 561, 85 C. C. A. 585, but not on this point.

In the prosecution of an interstate carrier for charging a less rate for the transportation of petroleum between two specified termini in different states than that scheduled in a filed joint tariff, in violation of Interstate Commerce Law, Act Feb. 4, 1887, the burden is on the government to show a common arrangement for a continuous carriage between the point mentioned in the filed joint tariff. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

16. *United States v. DeCoursey*, 82 Fed. 302.

A petition to recover under section 2 of the Interstate Commerce Act is sufficient if it states facts which show the circumstances and conditions under which the defendant had charged plaintiff a given rate for transportation of freight, and alleges, in the

language of the act, that for like services, under substantially similar circumstances and conditions, the defendant had charged another a less given rate, without alleging facts which show that the services were alike, or rendered under substantially similar circumstances and conditions, or that plaintiff was charged more than the schedule rate. *Kinnavey v. Terminal R. Ass'n of St. Louis*, 81 Fed. 802.

An indictment under section 2 which states that a carrier gave a rebate to one shipper without stating any instance in which the carrier refused a like rebate to another shipper is defective, as not showing discrimination. *United States v. Hanley*, 71 Fed. 672.

17. *United States v. Tozer*, 37 Fed. 635, 2 Int. Com. Rep. 597, 2 L. R. A. 444.

requisite certainty that the defendant has committed an act giving one shipper, or class of shippers, an advantage, or subjecting others to a disadvantage.<sup>18</sup> In an indictment against a railroad agent, under section 10, it is not necessary to allege that the particular act complained of was done under the direction or authority of the principal; and an allegation that the defendant, at the time the offense was committed, was agent of a certain railway company, and had general charge of its freight office at a certain place, sufficiently shows that the offense was committed under color of his office or agency.<sup>19</sup> An indictment for discrimination in the distribution of cars and motive power is insufficient where it alleges no facts showing the rightful share or quota of cars and motive power to which the coal company charged to have been so prejudiced was entitled, or that such company at the time charged was prepared to make shipments, and tendered the same and made demand for cars and motive power for their transportation in interstate commerce.<sup>20</sup> A railroad company is not subject to indictment under section 10 of the Act for its failure or refusal to furnish switch connections to a shipper tendering interstate traffic for transportation, although such connections are furnished to other shippers, where the indictment does not charge that those demanded are reasonably practicable and could be put in with safety, and would furnish sufficient business to justify the expense of their construction and maintenance, nor that the person or company asking for the same offered to pay such portion of their cost as is usual and reasonable.<sup>21</sup>

18. *United States v. Tozer*, 37 Fed. 635, 2 Int. Com. Rep. 597, 2 L. R. A. 444.

19. *United States v. Tozer*, 37 Fed. 635, 2 Int. Com. Rep. 597, 2 L. R. A. 444.

20. *United States v. Baltimore & O. R. Co.*, 153 Fed. 997.

21. *United States v. Baltimore & R. Co.*, 153 Fed. 997.

An indictment against a coal company for violation of the Elkins Act held to sufficiently allege the receiving of a discrimination from a carrier, and was therefore not demurrable. *United States v. Sunday Creek Co.*, 194 Fed. 252.

In considering the insufficiency of an indictment for receiving an unjust discrimination in rates from a carrier on an interstate shipment of property in violation of the Interstate Commerce Act, as supplemented by the Elkins Act, any doubts as to the correct construction of the statute should be resolved in favor of the evident intention of Congress that equality among shippers shall be maintained, and unjust discrimination and favoritism of all kinds condemned, leaving the question whether the existing conditions justified the difference in rates charged to be determined as one of fact on the trial.<sup>22</sup> An indictment, under Interstate Commerce Act, Feb. 4, 1887, as amended by Act June 29, 1906, charging shippers with receiving a concession, in that they accepted transportation of certain freight at a less rate than that filed with the Interstate Commerce Commission, but which failed to charge that the higher rate so filed had been and was posted as required, was fatally defective.<sup>23</sup> An indictment against a railroad company for a failure to observe its published tariffs by extending credit to a shipper under joint rates for a part of the freight due is not insufficient because it does not exclude the possibility that it received in cash its own share of such freights.<sup>24</sup> Where an indictment of a carrier for failure to file its tariff of rates for petroleum, established under a common arrangement for interstate shipment, in violation of the Elkins Act, alleged the establishment of a rate for carrying petroleum between intrastate terminals under a common arrangement for a continuous interstate shipment, and that each of the shipments under such rate were under shipping orders, transfer slips, and waybills, showing that the commodity was to be transported from the point of shipment to destination by a continuous route without unloading or trans-shipment, the indictment sufficiently charged a common arrangement between the various carriers for a through interstate shipment under a joint tariff.<sup>25</sup>

22. *United States v. Vacuum Oil Co.*, 153 Fed. 598.

23. *United States v. Miller*, 187 Fed. 375.

24. *United States v. Hocking Valley Ry. Co.*, 194 Fed. 234.

25. *United States v. New York Cent. R. Co.*, 153 Fed. 630, and the

An indictment against a railroad company and the agent of certain shippers, alleging that full schedule rates were first paid by the railroad company for the transportation of certain freight, and that thereafter \$920.39 was paid to the shipper's agent by way of rebates and concessions in respect to the transportation of freight under a previously made unlawful agreement, sufficiently charged that the payment of the rebate was a willful failure to observe the published tariff, and therefore stated a violation of the Interstate Commerce Act, as supplemented by the Elkins Act.<sup>26</sup> An indictment under Act Feb. 8, 1887, charging defendant with having deposited with an express company, for carriage to another State, "an article designed and intended for the prevention of conception," which charges that such article was contained in a package deposited with an express company named, at a place and on a date named, addressed to a particular person at a designated place in another State, is sufficiently specific, and need not more specifically describe the article.<sup>27</sup> An indictment charging one with issuing a free pass for railroad transportation, contrary to the Act of Feb. 4, 1887, is fatally defective for failure to allege any use of the pass or transportation under it.<sup>28</sup> In an indictment for obtaining transportation of interstate freight at an illegal rate in violation of Interstate Commerce Act, Feb. 4, 1887, § 10, as amended by Act June 18, 1910, § 10, paragraph 3, it was sufficient to charge the offense in the language of the statute, and it was not necessary to the validity of the indictment that the different tariffs should have been averred verbatim.<sup>29</sup> Where an interstate common carrier was indicted for

allegations of the indictment sufficiently showed that defendant's road, though entirely an interstate railroad, was part of a joint through route over which interstate commerce was transported, and was therefore subject to the provisions of such act.

26. *United States v. New York Cent., etc., R. Co.*, 146 Fed. 298.

27. *United States v. Popper*, 93 Fed. 423.

28. *In re Huntington* (D. C.), 63 Fed. 881.

29. *United States v. Sterling Salt Co.*, 200 Fed. 593, where a shipping order describing the contents of a car was so worded as to intentionally conceal its true character, and induce

charging a lower rate than that established by a filed joint tariff over a specified route for transportation of petroleum between the same termini over a different route, the indictment was not defective for failure to allege that the lower rate over the latter route was not scheduled and filed as required by Interstate Commerce Law, Feb. 4, 1887, § 6.<sup>30</sup> An indictment alleging facts showing that defendant, in pursuance of an unlawful arrangement made with the authorized agent of a shipper, made payments to him by way of rebate on shipments, under the guise of claims for services, charges payment of rebates in violation of the Elkins Act; the fact that a rebate is paid to another than the shipper being immaterial, though a payment which is but a commission for obtaining business for the carrier is not within the statute.<sup>31</sup>

An indictment against a railroad company for granting rebates in violation of the Elkins Act of February 19, 1903, need not set out a particular description of the device resorted to, but is sufficient where it avers the kind of property shipped, the time and place when and where shipped, the consignee, the existing legal tariff for such shipment, the payment thereof by the shipper, the subsequent payment of the rebate by the carrier to the shipper, and the time and amount of such payment.<sup>32</sup> An indictment charging an interstate carrier with giving a concession whereby a shipper secured through transportation of property between two points at less than the lawful rate is not insufficient because it does not aver the through rate, where it states the amount of the concession and that it was given from the lawful rate over a certain part of the route, which rate is also given.<sup>33</sup>

the carrier to apply a less rate than was legally applicable, the shippers were guilty of a false representation, for which they were subject to prosecution under the act as so amended.

30. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

31. *United States v. Delaware, etc., R. Co.*, 152 Fed. 269.

32. *Chicago, etc., R. Co. v. United States*, 162 Fed. 835, affg. *United States v. Chicago, etc., F. Co.*, 151 Fed. 84.

33. *Chicago, etc., R. Co. v. United States*, 157 Fed. 830, judgment affirmed 209 U. S. 90, 28 Sup. Ct. 439, Adv. S. U. S. 439, 52 L. Ed. —.



Under the Elkins Act, making the willful giving of concessions by interstate carriers from the established and published tariff rates an offense, an indictment alleging that the established and published rate per car for bulk lime between two points was \$70 per car of 40,000 pounds minimum, and that defendant charged and received for a specified car the sum of \$64.75 and no more, sufficiently charged that defendant granted a "concession" prohibited by the statute, though the count did not use the word "concession" to describe the alleged rebate.<sup>34</sup> Where an indictment for receiving rebates or concessions in violation of the Elkins Act, Feb. 19, 1903, whereby property was transported at less than tariff rates published and filed by the carrier, averred that there was an established through rate between the terminal points of the shipment to which the carriers concerned were parties, it need not aver the route over which the shipment was actually made.<sup>35</sup>

**§ 19. Indictment for rebating.—Evidence.—Variance.—Drawing of jury.**

A tariff sheet showing an established and published rate on bulk lime between two points of \$3.50 per ton in carload lots of not less than 40,000 pounds does not sustain an indictment against the carrier for granting a concession alleging that the established rate was \$70 a car of 40,000 pounds minimum.<sup>36</sup> In an indictment charging a shipper with having received a concession in violation of the Elkins Act, Feb. 19, 1903, whereby oil was transported for it in interstate commerce at a less rate than that named in the tariffs published and filed by the railroad company, an averment that such company established, published, and filed a rate on oil between Chicago and St. Louis of 19½ cents per hundred pounds

34. *Atchison, etc., R. Co. v. United States*, 170 Fed. 250, 95 C. C. A. 46, reversing *United States v. Atchison, etc., R. Co.*, 163 Fed. 111.

36. *Atchison, etc., R. Co. v. United States*, 170 Fed. 250, 95 C. C. A. 446, revg. judg. *United States v. Atchison, etc., R. Co.*, 163 Fed. 111.

35. *United States v. Vacuum Oil Co.*, 158 Fed. 536.

is not sustained by proof that its schedules named only the rate over its own line from Chicago to East St. Louis at 18 cents, and that the tariff on connecting lines between East St. Louis and St. Louis was  $1\frac{1}{2}$  cents.<sup>37</sup> It is essential for the government to prove that tariffs alleged to have been published and filed by the railroad company were posted, at least in the depot, station, or office of the railroad company where the shipments were received, as required by section 6 of the Interstate Commerce Act.<sup>38</sup> Where, in a prosecution against a carrier for alleged rebating on shipments of bulk lime, it was shown that the regular published rate was \$3.50 per ton, 40,000 pounds minimum; that the value of the lime was \$3.50 a ton at the point of shipment, and that the carrier had accepted in settlement sums varying from 35 cents to \$14.35 per car less than such established rate, evidence that the shipper had claimed that each of the cars had been loaded with at least the minimum amount, but that various amounts had been lost in transit, and that the carrier had not exacted freight on the amount so lost, was admissible as showing absence of the carrier's intent to grant a concession from the established freight rate.<sup>39</sup> While a Federal court is given discretion to direct the selection of jurors from any part of the district, such power should only be exercised where there is reason for it, and in a criminal prosecution of a corporation in the district including Chicago, which contains two-thirds of its population, where the case involves in a large way questions of the transportation of commerce, a panel drawn almost entirely from without the city and composed largely of farmers will be set aside, as not best calculated to return a fair and intelligent verdict, and panel drawn from the entire district.<sup>40</sup>

Under Elkins Act, Feb. 19, 1903, section one, making it unlawful for any person or corporation to accept or receive any rebate,

37. *United States v. Standard Oil Co.*, 170 Fed. 988.

38. *United States v. Standard Oil Co.*, 170 Fed. 988.

39. *Atchison, etc., R. Co. v. United*

*States*, 170 Fed. 250, 95 C. C. A. 446, rev'g judg. *United States v. Atchison, etc., R. Co.*, 163 Fed. 111.

40. *United States v. Standard Oil Co.*, 170 Fed. 988.

concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce, and requiring the filing and publication of interstate rates, a shipper cannot be convicted of accepting a concession from the lawfully published rate without proof of knowledge of what such rate in fact was; and hence evidence that the shipper had no knowledge of the published rate, and could only have ascertained the same by construction of several tariff sheets, the application of which was questionable, was admissible.<sup>41</sup> Defendant, Standard Oil Company of Indiana, was found guilty on 1,462 counts of an indictment for receiving concessions from a railroad company on shipments of oil, in violation of Elkins Act, Feb. 19, 1903, section 1. Defendant's capital stock was \$1,000,000, and there was no evidence that its assets were in excess of that sum, nor did it appear that defendant had ever before been guilty of a similar offense. A majority of defendant's capital stock was owned by the Standard Oil Company of New Jersey, which was no party to the prosecution, whose capital stock was \$100,000,000. This corporation was a holding company, and its net earnings for the period during which the concessions were received the court investigated before passing sentence. It was held that the assessment of the fine of \$29,240,000, which was the maximum punishment on each count, based on a finding that such amount was less than one-third of the net revenues of the Standard Oil Company of New Jersey during the period of violation, the effect of which would be to bankrupt the defendant, was excessive, and an abuse of discretion.<sup>42</sup> An indictment under the Elkins Act, Feb. 19, 1903, section 1, charging that defendant received concessions from the established through rate on shipments from Evansville, Ind., to Birmingham, Ala., via Grand Junction, Tenn., is not sustained by proof that shipments were made by defendant from Whiting, Ind., via Evansville to

41. *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376, rev'g judg. *United States v. Standard Oil Co. of Indiana*, 155 Fed. 305.

42. *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376, rev'g judg. *United States v. Standard Oil Co. of Indiana*, 155 Fed. 305.

Grand Junction, for beyond, at the lawfully filed and published rate which was prepaid, and were forwarded from there to Birmingham on orders from the consignee, which paid the freight, although the cost of the transportation from Evansville to Birmingham was less than the established through rate between such points.<sup>43</sup>

In a case cited in the note below the evidence was held sufficient to support a verdict finding that defendant knowingly accepted concessions as a shipper from the lawful rates established by railroad companies, in violation of Elkins Act Feb. 19, 1903, section 1, and sufficient to support a finding that there was a concert of action among the connecting carriers transporting an interstate shipment of merchandise in respect to the charges and the through movement of the traffic, the entire carriage having been made under a "blind" bill of lading issued by the initial carrier, which did not name its own nor a through rate.<sup>44</sup>

## § 20. Limitation of prosecution.

Section 1044 of the U. S. Revised Statutes, as amended in 1876, limiting prosecutions for offenses not capital to three years, being general in language, applies to all misdemeanors constituting offenses against the United States, whenever added by Congress to the list of statutory crimes.<sup>45</sup>

## § 21. Appeal—Prejudicial error—Defective indictment.

A want of particularity in describing the offense intended to be charged by an indictment is not a ground for reversing a conviction, where such indictment states the elements of the offense with sufficient particularity fully to advise the defendant of the crime

43. *United States v. Standard Oil Co. of Indiana*, 183 Fed. 223.

44. *Standard Oil Co. of New York v. United States*, 179 Fed. 614, 103 C. C. A. 172.

Evidence held admissible to establish a defense to a proposition of an

interstate carrier, for granting rebates under Elkins Act Feb. 19, 1903, § 1. *Merchants' & Miners' Transp. Co. v. United States*, 199 Fed. 202.

45. *United States v. Central Vermont Ry.*, 157 Fed. 291.

charged, and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense, in view of U. S. Rev. St., § 1025, U. S. Comp. St. 1901, p. 720, providing that a conviction shall not be affected by any defect or imperfection in matter of form not tending to prejudice defendant.<sup>46</sup> Only substantial defects in an indictment are available to reverse a conviction.<sup>47</sup> Where the judgment did not exceed that which might have been pronounced on any one of the counts of the indictment, it would not be disturbed if warranted by any count.<sup>48</sup>

## § 22. Appeal—Prejudicial error—Instructions and submission to jury.

Instructing the jury on the trial of a carrier for giving rebates to take into consideration the absence of a certain witness and the nonproduction of books in which entries were made concerning the transactions in question is not prejudicial error, where the jurors are left to attach such weight to these circumstances as they see fit, and are further instructed that there is no evidence that the defendant or those who controlled its corporate action destroyed or failed to produce any paper which the government asked.<sup>49</sup> Submitting to the jury on a prosecution against a shipper for accepting rebates in violation of the Elkins Act of February 19, 1903, the question whether or not there was a device to avoid the operation of the Act and to obtain the transportation at less than the carrier's published rates, did not prejudice the accused, where, under that Act, no device or contrivance, secret or fraudulent in its nature,

46. New York Cent., etc., R. Co. v. United States, 212 U. S. 481, 53 L. Ed. —, 29 Sup. Ct. 304, aff'g judg. United States v. New York Cent., etc., R. Co., 146 Fed. 298.

47. New York Cent., etc., R. Co. v. United States, 212 U. S. 500, 29 Sup. Ct. 309, 53 L. Ed. —, aff'g United States v. New York Cent., etc., R. Co., 146 Fed. 298.

48. Wisconsin Cent. Ry. Co. v. United States, 169 Fed. 76, 94 C. C. A. 444.

49. New York Cent., etc., R. Co. v. United States, 212 U. S. 481, 53 L. Ed. —, 29 Sup. Ct. 304, aff'g judg. United States v. New York Cent., etc., R. Co., 146 Fed. 298.

is requisite to the commission of the offense; any means by which transportation by a concession from the established rate was had being sufficient to work a conviction.<sup>50</sup>

**§ 23. Hepburn act prospective only.—Effect of repealing clause.**

The Hepburn Act June 29, 1906, amending the Elkins Act February 19, 1903, by striking out the provision apolishing imprisonment for offenses under the Acts to Regulate Commerce, and providing a punishment of imprisonment for a term not exceeding two years, etc., was prospective only in operation.<sup>51</sup> Under Rev. St. § 13, providing that the repeal of any statute shall not operate as a release from liability incurred under such statute, unless the repealing act shall expressly so provide, the saving clause contained in the Hepburn Act did not repeal the Elkins Act in so far as it affected an indictable offense thereunder, previously committed.<sup>52</sup> The Elkins Act is in full force as to offenses created thereby committed prior to the time it was superseded by the Hepburn Act.<sup>53</sup> The special saving clause of the Hepburn Act does not mention the particular subject of the general saving clause in Rev. St. § 13, as to the effect on existing penalties, forfeitures, and liabilities of a repealing act, and can be accorded reasonable operation, consistently with the true intent of its language and with the undisturbed operation of the general saving clause, by treating it as saving causes then pending in the courts from what, in its absence, and in the presence of the general saving clause, will be the effect on them of the amendments in that act. It does not necessarily supersede the general saving clause.<sup>54</sup>

**50.** *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428, aff'g judg. 153 Fed. 1, 82 C. C. A. 135; *Chicago, etc., R. Co. v. United States*, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. Ed. 698, aff'g judg. 157 Fed. 830.

**51.** *United States v. New York Cent., etc., R. Co.*, 146 Fed. 298.

**52.** *United States v. New York Cent., etc., R. Co.*, 153 Fed. 630.

**53.** *United States v. Great Northern R. Co.*, 157 Fed. 288.

**54.** *Great Northern Ry. Co. v. United States*, 155 Fed. 945, 84 C. C. A. 93, judg. aff'd 208 U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. —.

Section 10 of the Hepburn Act, relating to rates of interstate carriers, which provides that "all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law," when construed in accordance with the rule prescribed by Rev. St. § 13, does not relieve offenders under § 1 of the Elkins Act, from subsequent indictment and prosecution for such offenses, while leaving those previously indicted subject to punishment, but merely relates to the mode of procedure to be followed in pending causes.<sup>55</sup> The provisions of section 10 of the Hepburn Act apply to rebate offenses committed before, but prosecution for which was commenced after, the passage of such act; so that an indictment in such a case alleging that a carrier "unlawfully and willfully" gave rebates, which would be enough under the Elkins law, is sufficient, though under the Hepburn law it would be necessary to allege that they were given "knowingly."<sup>56</sup> In so far as the Elkins Act, § 1, provided for punishment of corporate carriers in granting, and corporate shippers in knowingly accepting, rebates or discrimination from legal rates and tariffs, it was not abrogated or repealed by the Hepburn Act, but was preserved, and so far as it provided for the punishment of such acts when not knowingly done, it was repealed.<sup>57</sup> Rev. St. § 13, was not an attempt to limit the power of succeeding Congresses; but it merely prescribes a rule of construction, binding upon the courts, as a substitute for the common law rule with respect to the effect of a repealing statute as a release from penalties and prosecutions for offenses committed under the statute repealed, and under it the

55. United States v. Chicago, etc., R. Co., 151 Fed. 84; United States v. Standard Oil Co., 148 Fed. 719.

56. United States v. Delaware, etc., R. Co., 152 Fed. 269.

57. Great Northern Ry. Co. v. United States, 155 Fed. 945, 84 C. C. A. 93, judg. aff'd 208 U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. —.

repeal of the penal statute extinguishes no penalties previously incurred thereunder, in the absence of an express extinguishing clause in the repealing act.<sup>58</sup>

#### § 24. When act took effect.

The joint resolution of Congress approved June 30, 1906, providing that the rate law of June 29, 1906, "shall take effect and be in force sixty days after its approval by the President of the United States," was ineffective to prevent such law from going into effect in accordance with its terms on the date of its approval by the President, which was the preceding day.<sup>59</sup> Since the Act June 29, 1906, became effective on that day by an express provision in § 11, its taking effect was not deferred by the joint resolution of Congress, passed June 30, 1906.<sup>60</sup>

#### § 25. Offenses.

The acceptance by a railroad company in settlements with a local coal company for interstate shipments of coal of notes of the shipper for a part of its freight charges, in accordance with an agreement and understanding between them, constitutes a "willful failure \* \* \* to strictly observe its tariffs," in violation of section 6 of the Interstate Commerce Act of February 4, 1887, as amended by Act June 29, 1906, § 2.<sup>61</sup> Any departure

58. *United States v. Chicago, etc., R. Co.*, 151 Fed. 84; *United States v. Standard Oil Co.*, 148 Fed. 719. it was not an attempt by Congress which enacted it to curtail the authority of succeeding Congresses by limiting in advance the effect to be given to their enactments, but was the substitution of a new rule of construction to be observed by the courts with respect to statutes to be thereafter enacted which is to be followed until abrogated by some later Congress.

59. *United States v. Standard Oil Co.*, 148 Fed. 719.

60. *Southern Pac. Co. v. W. T. Meadors & Co.*, (Tex. Civ. App.) 129 S. W. 170.

*Contra: Nicola. Stone & Myers Co. v. Louisville & N. R. Co.*, 14 I. C. C. Rep. 199, 206; *Goff-Kirby Coal Co. v. Bessemer, etc., R. Co.*, 13 Int. Com. Rep. 383, 13 I. C. C. Rep. 383.

61. *United States v. Hocking Valley Ry. Co.*, 194 Fed. 234.



by an interstate railroad company from the demurrage charges fixed by its filed and published schedules constitutes a misdemeanor under the Elkins Act Feb. 19, 1903, § 1.<sup>62</sup> On the trial of an indictment against a railroad company for granting concessions to a shipper in respect to interstate shipments in violation of the Elkins Act Feb. 19, 1903, § 1, and for failing to observe its published tariff rates with regard to demurrage charges, the questions whether defendant had made a settlement with the shipper as to such demurrage, and whether, if so, the cancellation of the charges was a valid settlement of a disputed claim or for the purpose of making a concession in violation of the law were questions of fact for the jury.<sup>63</sup> The Elkins Act is not restricted in its provisions to departures from an established tariff rate, but is violated if any other advantage is given to a shipper whereby a discrimination is practiced.<sup>64</sup> Shipments under a through bill of lading from an interior point in the United States

**62.** *Lehigh Valley R. Co. v. United States*, 188 Fed. 879, 110 C. C. A. 513, *affd. judg.* *United States v. Philadelphia, etc., R. Co.*, 184 Fed. 543, and *United States v. Lehigh Valley R. Co.*, 184 Fed. 546.

That demurrage charges fixed by the rate schedules of interstate railroad companies in a certain district were discriminatory as between a shipper located in such district and competitors placed in other districts and governed by different rates is no defense to a prosecution of a railroad company or the shipper for granting or receiving a concession by a cancellation of such charges, the only legal mode of correcting the discrimination being by a change in the schedules on proper notice or under authority from the Interstate Commerce Commission. *Id.*

**63.** *United States v. Philadelphia & R. R. Co.*, 184 Fed. 543; *United States v. Bethlehem Steel Co.*, 184 Fed. 546, holding also that an indictment containing a number of counts, each charging the granting of a concession by defendant to a shipper, by failing to collect a demurrage charge fixed by its published schedule of rates on a single car load shipment, is supported as to any one count by proof that at a single settlement between defendant and the shipper after all the shipments charged had been made defendant made a concession equal to the demurrage charges on all of the cars.

**64.** *United States v. Vacuum Oil Co.*, 153 Fed. 598.

to a foreign port are embraced in the provisions of Elkins Act Feb. 4, 1903, making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates.<sup>65</sup> A shipper is guilty of accepting transportation at less than the carrier's published rates, in violation of the Elkins Act, where, after the carrier has duly published a higher rate, he secures such transportation at the rate agreed upon in a prior contract with the carrier, which was the legal, published, and filed rate when the contract was made, since the statute, being then in force, is read into such contract, and becomes a part of it.<sup>66</sup> Where defendant, a terminal railroad company, received a car load of horses from a connecting railroad company, which had transported them in interstate commerce and had kept them confined in the car for more than 28 hours without unloading for rest, water, and feeding, in violation of the 28-hour law June 29, 1906, and was indicted and fined therefor, and defendant received them for transportation over its line for some 1,300 feet to stock yards, and moved them to such yards with all possible speed, and there unloaded them for rest, water, and feed, defendant was not chargeable with violation of the statute, but, on the contrary, its action aided in giving effect to its object and purpose.<sup>67</sup> Under Act Cong. June 29, 1906, § 2, requiring interstate carriers to publish a schedule of freight rates and make their charges accordingly, and Interstate Commerce Act Feb. 4, 1887, § 10, as amended by Act March 2, 1889, making it a fraud for a shipper to obtain a preference in freight rates by knowingly making a shipment under a false billing, etc., a contention that a shipper, innocent at the time and

65. *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, aff'g judg. 153 Fed. 1, 82 C. C. A. 135; *Chicago, etc., R. Co. v. United States*, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. Ed. 681, aff'd judg. 157 Fed. 830.

66. *Armour Packing Co. v. United States*, *supra*; *Chicago, etc., R. Co. v. United States*, *supra*.

67. *Northern Pac. Terminal Co. v. United States*, 184 Fed. 603, 106 C. C. A. 583.

ignorant of any classification or difference in rate, who shipped a race horse and paid the freight charged by the agent without being informed of the valuation made, is guilty of an offense under the statute, because he sues for injuries to the horse and seeks to recover the true value of the horse regardless of the rating, is self-refutatory.<sup>68</sup> Where, notwithstanding the jury found in defendant's favor on the recitals and conditions in a requested charge, they could also conclude under the evidence that defendant "knowingly" and "willfully" failed to comply with the food and rest law, an instruction charging that if such conditions were found the jury should find for defendant was properly refused.<sup>69</sup>

A joint stock association organized under New York laws to do an express business is subject to criminal prosecution under Interstate Commerce Act Feb. 4, 1887, § 10, as amended by Act June 18, 1910, § 10, for willful violation of the act, since under the first section of the original act, as amended by Act June 29, 1906, the term "carrier" is defined as including "express company."<sup>70</sup>

## § 26. Penalties for violation of regulations.

Under the Carmack Amendment Act of Congress, 1906, and Act South Carolina, Feb. 15, 1910, plaintiff is not entitled to a penalty against an express company for failing to trace and inform concerning an interstate shipment.<sup>71</sup> In the absence of any federal enactment relative to the interstate shipment of goods by express, an express company, which refuses to make delivery of express matter at the residence of the consignee, in a city of more than 2,500 inhabitants, in accordance with its implied undertaking, based on the receipt of a package so addressed, is liable to the

68. *Kessenger v. Fitzgerald*, 152 N. C. 247, 67 S. E. 588.

69. *Houston & T. C. R. Co. v. United States*, 168 Fed. 895, 94 C. C. A. 307.

70. *United States v. Adams Express Co.*, 229 U. S. 381, 33 Sup. Ct. 878. — L. Ed. —.

71. *Meetze v. Southern Express Co.*, 91 S. C. 379, 74 S. E. 823.

penalty imposed by Indiana Acts, 1901, p. 67, c. 62 (Burns' Ann. St. 1901, § 3312a).<sup>72</sup> South Carolina Act, 1904 (Laws 1904, p. 671), entitled "An act to prevent delays in the transportation of freight by railroads in this state," providing, by section 1, that railroads doing business in the State shall transport freight, received for "transportation within the state," without greater delay than specified, and declaring a penalty for noncompliance, does not apply to interstate commerce, and so does not cover a case of transportation partly out of the State; the delay occurring wholly out of the State.<sup>73</sup> Effective railroad regulations under Interstate Commerce Act, Feb. 4, 1887, must begin with the publicity of rates, and the penalty for failure to publish and file the rates is as severe as the penalty for failure to observe them after filing.<sup>74</sup> In an action for moving a car in connection with interstate commerce, in violation of Safety Appliance Act, March 2, 1903, it is no defense that the coupling became defective or the grab iron was lost so recently before the time mentioned in the petition as to make it impossible in the exercise of ordinary care to replace or repair it.<sup>75</sup> Where one boards a train to go from a point within the State to one without it, and pays the amount demanded therefor, not wishing or offering to break up the continuous passage by paying to that last station within the State

72. *State v. Adams Express Co.*, 171 Ind. 138, 85 N. E. 337.

73. *Hunter v. Charleston & W. C. Ry. Co.*, 81 S. C. 169, 62 S. E. 13; *Frazier v. Charleston & W. C. Ry. Co.*, 81 S. C. 162, 62 S. E. 14.

74. *United States v. Illinois Terminal R. Co.*, 168 Fed. 546.

75. *United States v. Wheeling & L. E. R. Co.*, 167 Fed. 198.

Where a railroad car is regularly used in the movement of interstate commerce, but at the time when a defect constituting a violation of Safety Appliance Act is discovered

is empty and not being used for interstate commerce, but is being hauled in a train containing a car loaded with interstate commerce, such car and every car in the train is impressed with an interstate character, and must be equipped as provided by such act. *Id.*

Where the safety coupler was broken, it is not a defense that defendant exercised reasonable care and diligence to keep the coupling apparatus on its cars in repair. *United States v. Southern Ry. Co.*, 135 Fed. 122.

on such route, the transaction is one as to interstate commerce, to which Kirby's Arkansas Dig. §§ 6611, 6620, fixing a maximum per mile passenger rate and declaring a penalty for a greater charge, have no application.<sup>76</sup> Kansas Laws, 1905, p. 591, c. 354, providing that railroad companies shall furnish free transportation to shippers of live stock, and authorizing actions to recover penalties for its violation, does not apply to interstate shipments.<sup>77</sup> Mississippi Code, 1892, § 2741, providing that action to recover a forfeiture or penalty on a penal statute shall be brought within one year, has no application to an action in the federal court against a common carrier to recover damages for discrimination in violation of Interstate Commerce Act, Feb. 4, 1887, §§ 2, 8, providing that for a violation of the terms of the act the carrier shall be liable to the persons injured for the full amount of damages sustained and for a reasonable counsel or attorney's fee to be taxed by the court; such an action is governed by Rev. St. U. S. § 1047, providing that no suit or prosecution for any penalty or forfeiture under the laws of the United States shall be maintained, except as otherwise specially provided, unless commenced within five years from the time when the penalty or forfeiture accrued, etc.<sup>78</sup> Texas Rev. St. 1895, arts. 4574, 4575, providing for the recovery of a penalty against a railroad company for unjust discrimination in the transportation of freight, have no application to interstate commerce; and a judgment under this statute for discrimination on a through shipment from a point in

76. *Kansas City S. Ry. Co. v. Brooks*, 84 Ark. 233, 105 S. W. 93, but where one boards a train to go to a point from within the State to one without it, but desires to break up the continuity of his journey, and offers, but is refused permission, to pay his fare to the last station in the State on the route, intending there to get a ticket for the rest of the trip, and a fare is collected of

him greater than he would have to pay had he been permitted to do so, there is a matter of intrastate commerce involved, making applicable the State law, fixing a maximum over mile passenger rate, and declaring a penalty for a greater charge.

77. *Missouri, etc., Ry. Co. v. Sinclair*, 77 Kan. 228, 94 Pac. 123.

78. *Carter v. New Orleans & N. E. R. Co.*, 143 Fed. 99, 74 C. C. A. 293.

Texas to a point in Illinois will be reversed on appeal.<sup>79</sup> Railroad receivers are not liable to an action for penalties under Rev. St. U. S. §§ 4386-4389, for failure to comply with the regulations as to transportation of live stock by "any company, owner, or custodian of such animals," since receivers are plainly not within the letter of the statute, and not necessarily within its purpose or spirit; and therefore, as the statute is penal, it cannot be construed to extend to them.<sup>80</sup>

### § 27. Penalties for violation of Federal 28-Hour Law.

Under Act of Congress June 29, 1906, § 1, prohibiting a carrier from confining animals longer than 28 consecutive hours without unloading for rest, water, and food, but providing that on the written request of the owner, or person in custody of the particular shipment, the time may be extended to 36 hours, and imposing a penalty for each violation of the act, where several shipments of live stock belonging to different owners are carried in the same train in violation of the act, each shipment, and not the train load, is the integer for the purpose of ascertaining the number of offenses committed.<sup>81</sup> It is the duty of a railroad company, under the 28-Hour Law, which receives cars of cattle in interstate commerce from a connecting carrier with knowledge that they have already been confined continuously for a longer time than permitted by the act to at once move them to pens and unload them for rest, feed, and water, and any delay, not excused, will subject it to the penalty imposed thereby.<sup>82</sup> The words "knowingly and willfully" in the statute, punishing a carrier who know-

79. *Gulf, etc., Ry. Co. v. Barry* (Tex. Civ. App.), 45 S. W. 814.

80. *United States v. Harris*, 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed. 780, affg. judg. 78 Fed. 290, and 85 Fed. 533, 29 C. C. A. 327.

81. *United States v. New York, etc., R. Co.*, 168 Fed. 699, 94 C. C.

A. 76; *United States v. Baltimore, etc., R. Co.*, 159 Fed. 33, 86 C. C. A. 223; *United States v. Southern Pac. Co.*, 171 Fed. 360, 96 C. C. A. 252; *United States v. Atchison, etc., R. Co.*, 166 Fed. 160.

82. *United States v. Delaware, etc., R. Co.*, 206 Fed. 513.

ingly and willfully fails to feed, water, and rest cattle shipped, describe an essential element of every right to the penalty therein prescribed.<sup>83</sup> The word "knowingly" as used in the law means with a knowledge of the facts which, taken together, constitute failure to comply with the statute;<sup>84</sup> and "willfully" meaning purposely or obstinately describes the attitude of the carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.<sup>85</sup> Where defendant received horses from a connecting carrier, which had confined them for a period longer than permitted by the 28-Hour Law, §§ 1, 3, and transported them to destination without unloading, it would be presumed that it did so with knowledge of the connecting carrier's default, or in the absence of evidence that it made reasonable inquiry and could not ascertain the fact.<sup>86</sup> Where a connecting carrier, having violated the law, delivered the confined horses to defendant terminal carrier, which, with knowl-

83. *St. Louis & S. F. R. Co. v. United States*, 169 Fed. 69, 94 C. C. A. 437.

The word "willfully" is not used as implying a vicious or evil intent, but as meaning intentionally or voluntarily. *United States v. Union Pac. R. Co.*, 169 Fed. 65, 94 C. C. A. 433.

84. *Oregon-Washington R. & Nav. Co. v. United States*, 205 Fed. 337; *St. Louis & S. F. R. Co.*, *supra*, as is the case where a carrier receives from another a car loaded with cattle, and, with knowledge of how long they have been confined without rest, water, or food, prolongs the confinement until the statutory limit has been exceeded.

85. *St. Joseph Stockyards Co. v. United States*, 187 Fed. 104, 110 C. C. A. 432, revg. judg. *United States*

*v. St. Joseph Stockyards Co.*, 181 Fed. 625; *Oregon-Washington R. & Nav. Co. v. United States*, 205 Fed. 337; *United States v. Stockyards Terminal Ry. Co.*, 172 Fed. 452, 101 C. C. A. 147.

A terminal carrier is not liable for penalty for violating the 28-hour law, if it was misled to believe that the stock had just been unloaded for rest, etc., by its immediate connecting carrier, and thereby unavoidably kept the stock confined beyond the lawful time. *Oregon-Washington R. & Nav. Co. v. United States*, 205 Fed. 341.

**Question for jury.**—Whether the carrier "knowingly and willfully" confined the stock in violation of the act was a question for the jury. *Id.*

86. *New York Cent., etc., R. Co. v. United States*, 203 Fed. 953.

edge of such violation, did not transport the car to destination as quickly as possible a judgment for a penalty recovered against the connecting carrier, was no bar to a recovery against defendant.<sup>87</sup> Mere proof warranting a conclusion that the carrier's employes negligently, as distinguished from "willfully" and "intentionally," omitted to feed and water certain sheep, in transportation, during the rest period, was insufficient to subject the carrier to a penalty.<sup>88</sup> A carrier, transporting cattle in patent cars, confining them for more than the period specified by the 28-Hour Law, without providing water in the pens, is liable for the penalty provided for such act.<sup>89</sup> In an action by the United States for violation of the 28-Hour Law, under Act June 29, 1906, the greater weight of evidence is sufficient, and proof beyond a reasonable doubt is unnecessary; it is the province of the court to fix the amount of the recovery, and that of the jury to determine the question of violation.<sup>90</sup> The question of the legality of written requests for an extension of time of confinement of cattle is a question of law for the court.<sup>91</sup> The burden is not on the government to show that the carrier was not prevented by storm or other accidental or unavoidable cause, which it could not have anticipated by the exercise of diligence and foresight, within the exception from liability created by the act.<sup>92</sup> Transportation of cattle in cars sufficiently large to enable them all to lie down at different times is not sufficient to exempt the carrier from the

87. *New York Cent., etc., R. Co. v. United States*, 203 Fed. 953, following *United States v. Lehigh Valley R. Co.*, 184 Fed. 971, *affd.* in *Lehigh Valley R. Co. v. United States*, 187 Fed. 1006, 109 C. C. A. 211. See also, *United States v. Wabash R. Co.*, 182 Fed. 802; *United States v. Northern Pac. Terminal Co.*, 181 Fed. 879.

88. *United States v. Lehigh Valley R. Co.*, 204 Fed. 705.

89. *United States v. New York Cent., etc., R. Co.*, 186 Fed. 541.

90. *Atchison, etc., R. Co. v. United States*, 178 Fed. 12, 101 C. C. A. 140; *Missouri, etc., R. Co. v. United States*, 178 Fed. 15, 101 C. C. A. 143.

91. *Missouri, etc., R. Co. v. United States*, *supra*.



duty to unload for rest under the law.<sup>93</sup> That the owner or caretaker of the stock, who accompanies them, agrees with the carrier to feed and water them, is insufficient to establish excuse for a violation of the law.<sup>94</sup> To bring a case within the proviso of section 3 of the 28-Hour Law, which exempts a carrier of live stock from compliance with the requirements of unloading the same at least once in 28 hours for rest, water, and feeding, "when the animals are carried in cars \* \* \* in which they can and do have proper food, water, space and opportunity to rest," the cars must not only be properly equipped for such purposes, but it is incumbent on the carrier to see that the animals do have proper and sufficient quantity of food and water supplied where they can reach it, and that they are not so overcrowded but that they have sufficient space for all to lie down at the same time.<sup>95</sup> Where cars of cattle are loaded at nearly the same time, although at different points, are forwarded to the same destination, the consignor and the consignee are the same, and they are consolidated into one train and so received by a connecting carrier, the failure of such carrier to unload the same for rest, water, and feeding, as required by the statute, constitutes but one violation of the statute.<sup>96</sup> The statute is applicable to a shipment originating in one State and ending in another, when confinement for more than the statutory period is shown, even though part of such period elapsed while the animals were in a foreign country.<sup>97</sup>

92. *United States v. Oregon Short Line R. Co.*, 160 Fed. 526.

93. *Erie R. Co. v. United States*, 200 Fed. 406, 118 C. C. A. 558, affg. judg. *United States v. Erie R. Co.*, 191 Fed. 941.

94. *Chicago, etc., R. Co. v. United States*, 195 Fed. 241, affg. judg.

*United States v. Chicago, etc., R. Co.*, 184 Fed. 984.

95. *United States v. New York Cent., etc., R. Co.*, 191 Fed. 198.

96. *United States v. New York Cent., etc., R. Co.*, 191 Fed. 198.

97. *Grand Trunk Ry. of Canada v. United States*, 191 Fed. 803.

## CHAPTER XXXV.

### EXEMPTIONS OF OWNERS OF VESSELS FROM LIABILITY.—THE HARTER ACT AND OTHER STATUTES.

- SECTION
1. Statutory exemptions from liability in general.
  2. Statutory exemption from liability by diligence of owner as to vessel.—In general.
  3. Statutory exemption from liability by diligence of owner as to vessel.—Seaworthiness, manning, equipment and supplies.
  4. Statutory exemption from liability by diligence of owner as to vessel.—Causes of loss or injury.
  5. Limitation of liability by contract or bill of lading.—In general.
  6. Limitation of liability by contract or bill of lading.—Exemption from particular risks or causes of loss.—In general.
  7. Limitation of liability by contract or bill of lading.—Exemption from particular risks or causes of loss.—Manner of loading or stowage.
  8. Limitation of liability by contract or bill of lading.—Exemption from particular risks or causes of loss.—Perils of the sea.
  9. Limitation of liability by contract or bill of lading.—Exemption from particular risks or causes of loss.—Unseaworthiness, or defective equipment or apparatus.
  10. Limitation of liability by contract or bill of lading.—Requirements as to notice and time to sue vessel.
  11. Persons liable for loss or damage.
  12. Carriage of passengers.—Personal injuries.—Limitation of liability.
  13. Carriage of passengers.—Passengers' baggage or effects.—Limitation of liability.

#### § 1. Statutory exemptions from liability in general.

In determining the effect of the Harter act in restricting the operation of general and well-settled principles, the court will treat those principles as still existing, and limit the relief from their operation afforded by the statute to that called for by the language itself of the statute.<sup>1</sup> The trend of judicial decision in the United

1. *Flint v. Christall*, 171 U. S. 187, *Chrystal v. Flint*, 32 Fed. 472.  
18 Sup. Ct. 831, 43 L. Ed. 130, revg.

States has been to construe the Harter act strictly, and not to extend the carrier's exemption from liability to doubtful and uncertain cases, but to leave such liability as it was defined and enforced by the law maritime and by the common law, unless the act plainly and unequivocally asserts a different liability.<sup>2</sup> Damage to cargo from the sinking of a ship after arriving in port, due to hurried and imprudent unloading, which brought the center of gravity of the ship too high for safety, does not result from faults or errors in navigation or in the management of said vessel within the meaning of Harter Act, Feb. 13, 1893, c. 105, § 3, exempting the owner of the vessel from liability, but arises from negligence, fault, or failure in proper loading, storage, custody, care, or proper delivery of merchandise, under section 1 of that act, so as to preclude any stipulation of exemption.<sup>3</sup> The unloading of cargo in the port of discharge by stevedores has no relation to the "management of the vessel," within the meaning of the third section of the Harter act, not being an act done with any view to such management, but relates to the "care or delivery of cargo," within the meaning of the first section; and where by the negligent and improper manner in which it was done it brought about a condition of instability in a ship, which, owing to a large accumulation of ice above her upper deck, rendered her topheavy, and she rolled over and sank at her dock, injuring the remaining cargo, she is liable for the damage, although other acts done or omitted in the management of the vessel may have contributed to the injury.<sup>4</sup> It is the duty of a ship to pay attention to any extraordinary circumstances that evidently affect her stability while discharging, and to regulate her mode of discharge accordingly, so as not to endanger the cargo. Negligence in such regard, which results in damage to cargo, is not a fault in the "management of the ship," within the exemption of the

2. *The Germanic*, 124 Fed. 1. 59 C. C. A. 521, *affd.* *Oceanic Steam Nav. Co. v. Aitken*, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610, decree 107 Fed. 294, modified.

3. *The Germanic*, *supra*; *Oceanic Steam Nav. Co. v. Aitken*, *supra*.

4. *The Germanic*, *supra*; *Oceanic Steam Nav. Co. v. Aitken*, *supra*.

third section of the Harter act, but rather in the care or proper delivery of the cargo, within the meaning of the first section, from which she is not exempt from liability.<sup>5</sup> To entitle the shipowner to exemption from liability under the third section of the Harter act, the damage must have "resulted" from the causes therein specified; and if the causes of the loss are several, one of which is negligence of the carrier not within that section, and that negligence, and not the sea peril, would, under the settled rules of construction as between ship and shipper, be deemed the efficient cause of the loss, then the exemption of the statute does not apply.<sup>6</sup> The action of the master of a vessel in permitting whale oil, which leaked from barrels, to remain in the bilges, with the object of saving it at the end of the voyage, did not pertain to the "management of the vessel," within section 3 of the Harter act; but injury to other cargo from such oil arose from "failure in proper care of the cargo," within section 1 for which the vessel was liable.<sup>7</sup> The Harter act does not affect the rights of parties under a charter party.<sup>8</sup> The owner of a vessel which has deviated from her voyage by his order is not relieved from liability for loss of cargo by fire during such deviation by an exemption of loss by fire in the bill of lading.<sup>9</sup> The injury of a cargo by water by reason of the failure to close a port for which an iron shutter was provided, after the glass cover had been broken out by the seas, where the cargo was so placed that the port was readily accessible, was due to a fault or error in navigation or in the management of the vessel, within section three of the Harter act; and neither the vessel nor her owners are liable therefor.<sup>10</sup> The selection of a place for anchorage, from which the stranding of the vessel re-

5. *The Germanic*, *supra*; *Oceanic Steam Nav. Co. v. Aitken*, *supra*.

6. *The Manitoba*, 104 Fed. 145.

7. *The Persiana*, 185 Fed. 396, 107 C. C. A. 416, revg. decree 156 Fed. 1019.

8. *Lake Steam Shipping Co. v. Bacon*, 129 Fed. 819.

9. *The Indrapura*, 171 Fed. 929.

10. *The Silvia*, 68 Fed. 230, 15 C. C. A. 362, 35 U. S. App. 395; *Franklin Sugar Refining Co. v. Red Cross Line, Id.*, affg. decree 64 Fed. 607. Decree in *The Silvia*, affd. 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241.

sulted by the dragging of her anchor from the great force of the current is a part of the navigation and management of the vessel, within section 3 of the Harter act, relieving the vessel, owners, etc., from liability for loss or damage of cargo.<sup>11</sup> It seems that where a cargo is shipped on a vessel, properly manned and equipped, for transportation to another port and storage there, on board, even if the contract is maritime, the Harter act would protect the owner from liability for damage caused by negligent management of the vessel while used for storage.<sup>12</sup> Faults consisting of failure to heed the warning of a government light, which indicates the location of a reef, and in presuming upon the entire accuracy of the compass or course, or upon deceptive appearances of distances, etc., are "faults or errors of navigation," within the meaning of section 3 of the Harter act.<sup>13</sup> The act applies only to claims for loss to cargo on board the vessel in fault.<sup>14</sup> A vessel's deviation, in towing another vessel, which she found stranded and in a dangerous position, to the nearest harbor where she pumped out, being for the purpose of saving life and property at sea, was justifiable under section 3 of the Harter act, but the further deviation, in towing her back to another port, after she had been made safe by the presence of tugs, was unjustifiable.<sup>15</sup> The act has no retroactive effect so as to apply to damages occasioned before its passage.<sup>16</sup>

Although the statute, Act Cong. March 3, 1851, limiting the liability of shipowners, which provides that such owners shall not be liable for loss or damage which may happen to any goods by

11. *Doherr v. The Etona*, 64 Fed. 880, decree affd. 71 Fed. 895, 18 C. C. A. 380, 38 U. S. App. 50.

Act applies to foreign vessels.—The extension of the provisions of the act to "any vessel transporting merchandise or property to or from any port of the United States," makes the act applicable to foreign vessels. *Id.*

12. *Norton v. The Richard Wins-*

*low*, 67 Fed. 259, decree affd. 71 Fed. 426, 18 C. C. A. 344.

13. *Manegold v. The E. A. Shores, Jr.*, 73 Fed. 342.

14. *Hawkins v. The Viola*, 59 Fed. 632.

15. *In re Meyer*, 74 Fed. 881.

16. *Humboldt Lumber Manufacturers' Ass'n v. Christopherson*, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264.

reason of fire, unless caused by design or neglect of such owners, changes the common law, it is not penal or in derogation of natural rights in such a way as to require a strict construction. It is rather a remedial act, passed to remedy the rigor of the common law, and should be construed, if not liberally, at least fairly to carry out the policy which it was enacted to promote.<sup>17</sup> Rev. St. U. S., § 4282 (Act March 3, 1851), exempting vessel owners from liability for loss of or damage to goods by fire "happening to or on board of the vessel," is limited in its application to fires on shipboard, and has no application to a case where goods were destroyed by fire after they had been unloaded from the vessel onto a wharf boat;<sup>18</sup> or landed on the wharf;<sup>18a</sup> or to loss of goods by fire while in a warehouse.<sup>19</sup> But cargo delivered on a wharf into the charge of the officers of a vessel is "shipped," so as to free the shipowners, under this act, from liability for loss by a fire occurring without their design or neglect, although the loss was caused by the negligence of the ship's officers in not promptly putting the goods on board.<sup>20</sup> Section two of the act, discharging the shipowner from liability for certain valuable goods, unless the shipper, at the time of the lading, gives a note in writing stating their character and value; does not make the absence of such "note in writing" a discharge of the shipowner's liability on a contract of affreightment, where the true character and value of the enumerated articles have been fairly and clearly set down in the bill of lading, whether before or after the actual shipment.<sup>21</sup> Under section 3 of this act, limiting the liability of shipowners to the amount of interest in the vessel and the freight then pending, the personal liability of shipowners on a contract of affreightment ceases upon a total destruction of the vessel and loss of freight before the com-

17. *Chamberlain v. Western Transp. Co.*, 44 N. Y. 305, 4 Am. Rep. 681, revg. 45 Barb. (N. Y.) 218.

18. *The City of Clarksville*, 94 Fed. 201.

18a. *The Egypt*, 25 Fed. 320.

19. *Black v. Ashley*, 80 Mich. 90, 44 N. W. 1120.

20. *Dill v. The Bertram*, Fed. Cas. No. 3,910.

21. *Wattson v. Marks*, Fed. Cas. No. 17,296.

pletion of her voyage, though the actual damage to or loss of the goods to be carried, as in the case of theft, has taken place prior to the destruction of the vessel.<sup>22</sup> Where libellant's agent, who was intending to take passage on a steamboat from Detroit to a Canadian port, intrusted a quantity of gold coin to the master before the vessel started without taking a bill of lading or delivering a note in writing, and on returning on board the coin was missing, the vessel was not liable, as section 2 of the statute expressly exempts it from liability.<sup>23</sup> Horses and trucks, which are taken aboard a ferryboat by their drivers, who are passengers, and remain in their charge upon the trip, are not "merchandise," within the meaning of Rev. St. U. S., § 4282, which provides that no owner of any vessel shall be liable for loss or damage to any merchandise from fire, unless caused by design or neglect.<sup>24</sup> Where a steamer with a cargo, chiefly of lime, took fire, and was scuttled by the city fire department, whereby the lime was destroyed, under Rev. St. U. S., § 4282, a purchaser of the vessel had a complete defense against an action *in rem* against the vessel.<sup>25</sup> A libel *in rem* will not lie for injuries to goods by fire caused by the alleged negligence of the master, who was also a part owner, under Act March 3, 1851, exempting vessel owners, in cases of loss by fire, from liability for the negligence of their officers and agents in which the owners have not directly participated.<sup>26</sup> An action arising from independent acts of negligence on the part of the ship, and from the breach of a maritime duty, in failing to enforce a general average contribution, is not within the provisions of Rev. St. U. S., § 4282, exempting shipowners from liability from damage to merchandise on board their vessels occasioned by fire.<sup>27</sup> The exemption provisions of Rev. St. U. S., § 4282, do not

22. *Wattson v. Marks*, *supra*.

23. *The Island Queen*, Fed. Cas. No. 7,110 (Brown, Adm. 279).

24. *The Garden City*, 26 Fed. 766.

25. *Deming v. The Rapid Transit*, 53 Fed. 320.

26. *Keene v. The Whistler*, Fed.

Cas. No. 7,645 (2 Sawy. 348).

27. *Heye v. North German Lloyd*, 33 Fed. 60, 2 L. R. A. 287.

relieve the owner of a vessel from any consequence of his own neglect, but only from the negligence of his servants.<sup>28</sup> Under this statute, the owners of a steamer, engaged in the carrying trade between Baltimore, Norfolk and Portsmouth, are not liable for the loss of goods by the destruction of the vessel and cargo by fire, unless caused by the design or neglect of the owners.<sup>29</sup> Vessels navigating Long Island Sound, and constructed for ocean or coast-wise navigation, are within the provisions of this act, and the owners thereof are not liable to answer for loss or damage by fire to any merchandise shipped in the same, unless such fire was caused by the design or neglect of such owners.<sup>30</sup> The exemption from liability for loss of goods from accidental fire, conferred by the statute, does not extend to a carrier who transports goods by a vessel of which he is neither owner nor charterer.<sup>31</sup> A steamboat company, receiving goods at A. to be transported to B., and carrying them part of the distance to C., where they were delivered to a boat owned by other parties to be carried the remainder of the distance to B., is not the owner or charterer of the latter boat, in the spirit or letter of the statute, so as to be entitled to claim the exemption provided therein for losses occasioned by actual fire.<sup>32</sup> Under the English statutes in relation to compulsory pilotage in the port of Liverpool, an owner of a vessel is not relieved from

28. *Woodhouse v. Cain*, 95 N. C. 113; *Hill Mfg. Co. v. Providence, etc., S. S. Co.*, 113 Mass. 495, 18 Am. Rep. 527, and the act or neglect of the officers of a corporation owning a vessel is the act or neglect of the ship-owner, taking the case out of the operation of the act.

29. *Headrick v. Virginia, etc., Ry. Co.*, 48 Ga. 545. nor does the fact that such owners have formed an association with other companies as carriers, extending their business as carriers into the interior, affect the question of liability for such loss.

30. *Knowlton v. Providence, etc., S. S. Co.*, 33 N. Y. Super. Ct. (1 Jones & S.) 370, and the fact that such a vessel, in her voyage, entered and passed through or into any bays or rivers, does not bring the same within the exception, in the same act, of vessels "used in rivers or inland navigation."

31. *Hill Mfg. Co. v. Boston & L. R. Corp.*, 104 Mass. 122, 6 Am. Rep. 202.

32. *Rice v. Ontario Steamboat Co.*, 56 Barb. (N. Y.) 334.



liability for damage to freight, unless a pilot was in charge under the act, and was actually and necessarily engaged in the discharge of his duty. Where, therefore, a vessel had left its dock in charge of a pilot, and anchored in the river to finish loading and to receive coal for a voyage, and while at anchor an accident occurred, causing the loss, the owner was not excused from liability by said statutes.<sup>33</sup>

**§ 2. Statutory exemption from liability by diligence of owner as to vessel.—In general.**

The navigation and management of a vessel within the meaning of section 3 of the Harter Act, Feb. 13, 1893, includes the determination of the time and manner of leaving port, which is the prerogative of the master; and under said section, where a vessel was seaworthy and in all respects properly manned, equipped and supplied, the owners are not liable for a loss or damage to cargo due to a peril of the seas, even though the exposure to such peril was through the fault of the master in failing to ascertain or heed the warnings of the weather bureau before starting on the voyage.<sup>34</sup> The tipping of a vessel by the head by the master while discharging cargo for the purpose of examining her propeller, and having nothing to do with the discharge of the cargo, was an act of management of the ship within section 3 of the Harter act, and, where the owner had complied with the requirements of said section at the commencement of the voyage, neither he nor the vessel is liable for a resulting injury to the cargo.<sup>35</sup> Where, in

**33.** *Guiterman v. Liverpool, etc., S. S. Co.*, 83 N. Y. 358.

**Limitation of liability under state statutes.**—See *Pope v. Nickerson*, Fed. Cas. No. 11,274 (3 Story, 465); *Van Harn v. Taylor*, 7 Rob. (La.) 201, 41 Am. Dec. 279; *Kirk v. Folsom*, 23 La. Ann. 584; *Darrall v. Southern Pac. Co.*, 47 La. Ann. 1455, 17 So. 884.

**34.** *Hanson v. Haywood Bros. & Wakefield Co.*, 152 Fed. 401, 81 C. C. A. 527.

**35.** *The Indrani*, 177 Fed. 914, 101 C. C. A. 194.

A shipowner is not deprived of the protection given by section 3 of the Harter act against liability for injury to cargo resulting from a broken suction pipe because it was

an action against a shipowner for merchandise lost, the loss is admitted, the burden is on the shipowner setting up exemption from liability, under section 3 of the Harter act, providing that, if a shipowner shall exercise due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, he shall not be responsible for loss resulting from errors in navigation or in the management of the vessel, to prove that it exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied at the commencement of the voyage.<sup>36</sup> The provisions of section 3 of the Harter act apply to foreign vessels carrying goods to or from ports of the United States.<sup>37</sup> They include a foreign vessel carrying cargo from a foreign to an American port.<sup>38</sup> They also apply to vessels

not proved that the pipe was inspected at the commencement of the voyage, where it was shown that it was in good condition after the voyage was commenced, that the break was new, and it was sufficiently accounted for by the straining of the ship during very rough weather on the voyage. *Id.*

36. *I. C. Levy's Son & Co. v. Gibson Line of Steamers*, 130 Ga. 581, 61 S. E. 484.

Where the shipowner set up exemption from liability by the Harter act, and assumed the burden of proof, and the evidence was conflicting as to whether the shipowner exercised "due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied" at the commencement of the voyage, a charge that, in order for the sinking of a vessel a few hours after leaving port to raise a presumption of unseaworthiness at the time it left port, it would be necessary for the evidence to show that the

vessel sank because of some fault in its construction, or the stowage of its cargo, or of fault in some respect which would make it unseaworthy at the time it left port, or that it was not properly manned or equipped or supplied, was confusing, and tended to impress on the jury that it was incumbent on the shipper to show that the vessel was unseaworthy, rather than on the shipowner to show that it had exercised due diligence to make the vessel in all respects seaworthy, etc. *Id.*

37. *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241, affg. judg. 68 Fed. 230, 15 C. C. A. 362, which affirms decree 64 Fed. 607; *Doherr v. The Etona*, 64 Fed. 880, decree affd. 71 Fed. 895, 18 C. C. A. 380; *Franklin Sugar Refining Co. v. Red Cross Line*, 68 Fed. 230, 15 C. C. A. 362, 35 U. S. App. 395.

38. *The Chattahoochee*, 74 Fed. 899, 21 C. C. A. 162, decree affd. 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801.

engaged in commerce on the Bay of San Francisco, and between ports on the bay,<sup>39</sup> and to vessels engaged in commerce on the Great Lakes.<sup>40</sup> Where a ship, generally staunch and of high rating, was carefully inspected before the voyage commenced, both by the owners and by the insurers, but in passing Cape Horn she had for twenty days rough seas, aft gales, and much rolling and shipping of water, through which the seams of her waterways began working and took in some water, causing a comparatively small amount of damage to her cargo of tea, it was held that the owners had used due diligence to make the ship seaworthy, within the Harter act exempting them from liability.<sup>41</sup> Where, on a voyage from Jamaica, sugar cargo in the aft hold was damaged by sea water coming in through a small hole made during the voyage in one of the bottom iron plates of the ship; examination showed corrosion of the iron plate to a thin edge at the place of the hole, arising from the acid of sugar drainage and sea water, which obtained access to the inside of the plate through cracks in the six-inch layer of Portland cement; and defendant contended that the cracks, and the consequent access of acid drainage and corrosion, arose from a blow against the outside of the plate during the voyage, it was held that, there being a failure to show due diligence in inspecting the hold before the commencement of the voyage, no weight could be given to the mere conjecture of an outside blow as the cause of the injury, and the Harter act did not relieve defendant from liability.<sup>42</sup> Where a leak in the centerboard seams along the keelson and grub beam in the bottom of a schooner, by which, during two hours, she took in three feet of water, occurred soon after leaving port, and was due to mere rolling in a calm, it was held that such leak was inconsistent with reasonable fitness for the voyage, or with that necessary careful inspection of the

39. *In re Piper Aden Goodall Co.*, 86 Fed. 670.

40. *Manegold v. The E. A. Shores, Jr.*, 73 Fed. 342.

41. *Mosle v. The Sintram*, 64 Fed. 884.

42. *Welsh v. The Alvena*, 74 Fed. 252, decree aff'd. 79 Fed. 973, 25 C. C. A. 261, 51 U. S. App. 100.

seams about the centerboard which "due diligence," under the Harter act, required; and that the vessel was liable for damage to sugar cargo caused thereby.<sup>43</sup> Where cargo is damaged by defects in the steamer which a proper inspection would have disclosed, there is a lack of the "due diligence" which the Harter act requires in order to excuse the carrier from liability.<sup>44</sup> A ship-owner is chargeable with any neglect of his agents appointed to inspect a steamer to exercise the "due diligence" required by the Harter act.<sup>45</sup>

Where a portion of the cargo of a steamship, properly stowed, took fire from heat caused by the flue of an engine; the vessel and machinery were constructed by competent builders; she was given high rank by Lloyds' Register, and it was shown that her plan was in accordance with the best known designs for safety against fire, it was held that, under U. S. Rev. St., § 4282, the owners were not liable for the cargo destroyed.<sup>46</sup> A tug engaged in towage, the tug and tow belonging to distinct owners, having with each other only the relation arising under an ordinary contract for safe towage, is not within the Harter act, providing a certain exemption for vessels "engaged in transporting merchandise or property."<sup>47</sup>

### § 3. Statutory exemption from liability by diligence of owner as to vessel.—Seaworthiness, manning, equipment, and supplies.

The provisions of the Harter act making it unlawful to insert in the contract a provision exempting from liability for damage from unseaworthiness where due diligence has not been used (section 2), and also exempting from loss from faults or errors in

43. *Hewlett v. The Millie R. Borannon*, 64 Fed. 883.

44. *Switzerland Marine Ins. Co. v. The Flamborough*, 69 Fed. 470.

45. *Switzerland Marine Ins. Co. v. The Flamborough*, *supra*.

46. *The Strathdon*, 89 Fed. 374.

47. *The Murrell*, 200 Fed. 826, sec-

tion 3 of the Harter act, exempting vessel owners from liability for loss or damage to cargo under certain conditions, construed, and held not to exempt the owner of a tug from liability for loss of a tow and its cargo, because it was also charterer of the tow and carrier of its cargo.

the navigation or management of the vessel, if due diligence has been used to furnish a seaworthy ship properly manned, equipped and supplied (section 3), do not so change the general maritime law as to relieve the owner from his obligation to provide a seaworthy ship, and substitute therefor an obligation merely to use due diligence to see that she is seaworthy.<sup>48</sup> Section 3 of the Harter act does not relieve the owner from the duty of furnishing a seaworthy vessel at the beginning of the voyage, nor affect his liability for damages to the cargo arising from unseaworthiness, but only exempts him from liability for damage arising from the risks therein designated when due diligence has been used to make the vessel seaworthy, etc. There is no expressed intention in the statute to replace the carrier's obligation under the general maritime law to furnish a seaworthy vessel by the less extensive obligation to exercise due diligence to that end, and it cannot be extended by construction beyond its terms.<sup>49</sup> The statute does not lessen the owner's obligation to furnish a seaworthy ship at the inception of the voyage in respect to losses arising from causes other than those designated. It is not enough that he uses due diligence, but the ship must be seaworthy.<sup>50</sup> A shipowner is not

48. *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181, revg. decree 68 Fed. 254, 15 C. C. A. 385.

49. *Farr & Bailey Mfg. Co. v. International Nav. Co.*, 94 Fed. 675, revd. 98 Fed. 636, 39 C. C. A. 197, affd. *International Nav. Co. v. Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830.

Negligence in failing to have the portholes in a compartment of a vessel closed when the voyage begins, whereby the vessel is rendered unseaworthy, and in consequence injury is sustained to cargo by water coming through portholes during the

voyage, renders the shipowner liable under section 3 of the Harter act, since negligence is not a mere fault or error in navigation or in the management of the vessel, but amounts to a failure to exercise due diligence to make the vessel seaworthy. Decree, *Farr & Bailey Mfg. Co. v. International Nav. Co.*, 98 Fed. 636, 39 C. C. A. 197, affirmed. *International Nav. Co. v. Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830.

50. *Insurance Co. of North America v. North German Lloyd Co.*, 106 Fed. 973, affd. *Nord-Deutscher Lloyd v. President, etc., of Insurance Co. of*

exempted by the Harter act from liability for damage to cargo resulting from her unseaworthy condition at the commencement of the voyage, although it is shown that he exercised due diligence to make her in all respects seaworthy.<sup>51</sup> Section 3 of the Harter act, which provides that, if the owner of a vessel shall exercise due diligence to make such vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel nor owner shall be liable for loss or damage to cargo resulting from faults or errors in navigation or management, nor from perils of the sea, as construed by the Supreme Court, does not exempt the vessel nor owner from liability for the consequences of unseaworthiness, even though due diligence was exercised to make her seaworthy.<sup>52</sup>

To constitute a ship seaworthy when she enters on a voyage, she must be fit, in design, structure, condition and equipment; and she cannot be said to be fit, as to condition, when both the iron and glass coverings of a port, which it is the usual custom to close and fasten before sailing, though structurally fit, are, through inadvertence, insecurely fastened, so that, although the vessel does not encounter bad weather or rough seas, such covers become open, and admit sea water, which damages the cargo. In such case the damage must be held to result from the unseaworthiness of the ship, and not from any fault or error in navigation, or in the management of the vessel, for which the owners are exempted from liability by section 3 of the Harter act, as the master was justified in supposing that the port had been securely closed before sailing, in accordance with the usual custom, and was not chargeable with fault in failing to cause it to be thereafter examined, although the

North America, 110 Fed. 420, 49 C. A. 1.

51. *The C. W. Elphicke*, 122 Fed. 439, 58 C. C. A. 421, affg. decree 117 Fed. 279.

A shipowner does not comply with section 3 of the Harter act, so as to be entitled to the exemptions therein provided, by merely furnishing proper

equipment of the vessel prior to the commencement of the voyage, but he is bound to see that his servants exercise due diligence in its use to make the vessel seaworthy at the time the voyage actually commences. *Id.*

52. *The Ninfa*, 156 Fed. 512.

cargo was so stored that it was accessible.<sup>53</sup> The due diligence required of a shipowner to render his vessel seaworthy by Harter Act, Feb. 13, 1893, § 3, must take into consideration the nature of the cargo and of the voyage.<sup>54</sup> Due diligence to make a vessel seaworthy at the commencement of her voyage, which will entitle the carrier to the exemptions given by section 3 of the Harter act, must be exercised in the work itself, and not merely in the selection of agents to do the work, and must be adequate to accomplish the results intended, except as to latent defects not discoverable by the utmost diligence. Due diligence was not exercised to make a lighter seaworthy and fit for the business in which it was employed, where the seams were so improperly calked that they opened and admitted water into the hold when the boat was racked by a slight swell from a passenger steamer; the defect being one which could have been discovered by examination.<sup>55</sup> If a ship starts on a voyage with a port negligently left open, causing damage to a cargo, her owners are liable for failing to provide a ship seaworthy at the beginning of the voyage, and are not protected by section 3 of the Harter act, on the ground that the fault was one in navigation or the management of the vessel, although proper appliances for closing the ports were furnished; and this rule is especially applicable where the ports were so located as to be submerged when the vessel was fully loaded.<sup>56</sup> Where a ship was

53. *Farr & Bailey Mfg. Co. v. International Nav. Co.*, 98 Fed. 636, 39 C. C. A. 197, *affd.* *International Nav. Co. v. Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830, *revd.* 94 Fed. 675.

54. *The Jean Bart*, 197 Fed. 1002.

The negligent failure of the officers of a vessel to make proper use of the ventilating apparatus by which cargo was damaged was not a fault in the management of the vessel within section 3 of the Harter act, but a negligence or fault or failure in proper care of the cargo within section 1.

for which the owner was liable. *Id.*

55. *Nord-Deutscher Lloyd v. President, etc., of Insurance Co. of North America*, 110 Fed. 420, 49 C. C. A. 1.

56. *The Tenedos*, 151 Fed. 1022, 82 C. C. A. 671, *affg.* *decree* 137 Fed. 443, also holding that due diligence on the part of the owners to render the vessel seaworthy when she commenced the voyage required that inspection should have been made the last thing before access to the ports was cut off, and that the damage to cargo was due to unseaworthiness for which the vessel was liable.

equipped with a tank usable for cargo or water ballast, into which extended a pipe five and one-half inches in diameter, reaching nearly to the bottom, and having its lower end open; this pipe could be connected by valves with the sea, and was used both for filling the tank and pumping it out; during a voyage on which sugar was stowed in the tank, the valve closing such pipe became obstructed by a stick five inches long, which the evidence tended to show was drawn into the pipe from the tank when the pumps were being tried; and sea water entered through the opening, which damaged the cargo, it was held that the failure to place a rose or screen on the lower end of the pipe to prevent the entrance of foreign substances which might foul the valve was a failure to exercise due diligence in equipment to make the ship seaworthy at the beginning of the voyage, and which rendered her liable for the damage, under section 3 of the Harter act.<sup>57</sup> Due diligence to make a vessel in all respects seaworthy, within the meaning of section 3 of the Harter act, does not require merely due diligence on the part of the owner himself, nor in respect to construction only, but on the part of those to whom the owner has intrusted the duty, and in respect not only to construction, but also to inspection, maintenance and repair.<sup>58</sup> The furnishing of a re-

57. *The Brilliant*, 159 Fed. 1022, 86 C. C. A. 671, affg. 138 Fed. 743.

58. *The Ninfa*, 156 Fed. 512.

**Inspection, repair and equipment.**

—Where, before entering upon a voyage, a ship was surveyed by three competent and experienced men, employed respectively by the owners and the insurers, and was by all pronounced staunch and seaworthy, and the owners employed men of skill and experience to overhaul the vessel and make all needed repairs, to supply and equip her for the voyage, and stow the cargo, and also an experienced master and crew, and no neglect or mistake in such particulars is

shown, the owners must be held to have exercised due diligence to make the vessel seaworthy, and properly manned, equipped, and supplied, and to be relieved from all liability on account of loss of property, by section 3 of the Harter act. *The Jane Grey*, 99 Fed. 582.

**Docking for examination.**—Reasonable care of a vessel does not require docking for examination more than once a year, in the absence of some known necessity for it. *American Sugar-Refining Co. v. The Sandfield*, 79 Fed. 371, decree affd. *The Sandfield*, 92 Fed. 663, 34 C. C. A. 612.



frigerator apparatus in good order and repair, competent for the safe transportation of a cargo of dressed beef which a vessel has undertaken to carry, is within the obligation to use due diligence to provide a seaworthy vessel, imposed upon the owner by the Harter act, as a condition precedent to the enjoyment of the benefits of that act in limiting the owner's liability as provided therein.<sup>59</sup> Failure to have a mechanical fog horn in good condition for use at the commencement of a voyage shows want of due diligence in equipping the vessel, and is not a fault in her management, so as to excuse the owners from liability under the Harter act.<sup>60</sup> To constitute due diligence on the part of a shipowner to make the vessel "in all respects seaworthy" at the beginning of a voyage so as to entitle him to the benefit of the exemption contained in section three of the Harter act, it is not sufficient to provide her with proper structures and equipment, but due diligence must also be exercised by the owner's servants in the use of such equipment before and up to the time of the beginning of the voyage.<sup>61</sup> Neither

59. *Martin v. The Southwark*, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65, revg. *The Southwark*, 108 Fed. 880, 48 C. C. A. 123.

60. *Stahl v. The Niagara*, 84 Fed. 902, 28 C. C. A. 528.

61. *The Manitou*, 116 Fed. 60, affd. 127 Fed. 554, 63 C. C. A. 109.

Where the owner of a vessel, while in her home port, permitted all of her crew to leave for the night, except the fireman, cook, and a deck hand, and permitted them to sleep without maintaining a proper watch, and the fires to be banked so that no steam was available to work the pumps in case of an emergency, he was guilty of negligence, rendering the vessel liable for loss of cargo by the sinking of the vessel from injuries caused by an ice jam, notwithstanding the Harter act, section 3, provid-

ing that, if the owner shall exercise due diligence to make the vessel seaworthy, and properly manned, equipped, and supplied, he shall not be liable for negligence in the navigation or management thereof, etc. *The Valentine*, 131 Fed. 352.

See also, *The Catania*, 107 Fed. 152, wherein it was held that a vessel was not seaworthy on sailing as to a compartment not originally intended for cargo, but sometimes used for that purpose, nor was due diligence used to make her so, within the provisions of the Harter act or similar provisions in the bills of lading; that there was a lack of suitable care, also, in loading the cargo in the compartment with a water-service pipe not suitably protected against frost, and without inspection as to its condition, which could have been readily

sections 1 nor 3 of the Harter act relieves a shipowner from responsibility for the unseaworthy condition of the ship, due to her improper loading, which renders her topheavy and unstable to such extent as to make her unfit to encounter the ordinary perils of navigation which should reasonably have been anticipated during the voyage.<sup>62</sup> The act applies in a case where the question of liability arises in a proceeding by the owner for limitation of liability, as well as in a direct action against him.<sup>63</sup> To exempt the owner from all liability under Rev. St., § 4283, it must appear that the loss or damage was "done or incurred without the petitioner's privity or knowledge." To exempt it under the Harter act from the claims of cargo owners, it must appear that the ship was seaworthy in fact, or that "due diligence" was used to make her so; and the burden of proof is upon the petitioner.<sup>64</sup> A carrier by water can only avail himself of the exemptions from liability for errors of management and navigation provided by the Harter Act, Feb. 13, 1893, § 3, by affirmative proof that the vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so, and such affirmative proof cannot be supplied by inferences or presumptions.<sup>65</sup>

discovered and easily remedied, so as to prevent exemption of the owners from liability under other provisions of the bills of lading.

Where sugar cargo stowed in a hold was damaged during a voyage by seawater, which leaked from a water-ballast tank, through a man-hole opening into the hold, it was held that the damage must be attributed to the unseaworthy condition of the vessel at the commencement of the voyage, due to negligence, for which the owners were not exempted from liability by the Harter act. *American Sugar Refining Co. v. Rickinson*, 120 Fed. 591, decree rev'd. *American Sugar Refining Co. v. Rick-*

*inson Sons & Co.*, 124 Fed. 188, 59 C. C. A. 604.

62. *The Oneida*, 128 Fed. 687, 63 C. C. A. 239.

63. *In re California Nav. & Imp. Co.*, 110 Fed. 678.

64. *The Colima*, 82 Fed. 665. See also, *The Aggi*, 93 Fed. 484, wherein it was held that the facts were insufficient to sustain the burden resting on the owners to show due diligence to render the ship seaworthy at the inception of the voyage, under the requirements of the Harter act.

65. *Bradley v. Lehigh Valley R. Co.*, 153 Fed. 350, 82 C. C. A. 426, affg. decree 145 Fed. 569.

Damage to a cargo of molasses,

**§ 4. Statutory exemption from liability by diligence of owner as to vessel.—Causes of loss or injury.**

Section 3 of the Harter act, which exempts the owner of any vessel transporting property from liability for loss or damage thereto resulting from faults or errors in navigation, or in the management of the vessel, if he has exercised due diligence to make such vessel in all respects seaworthy and properly manned, equipped and supplied, applies only to a vessel after the voyage has commenced, and cannot be invoked by an owner to relieve him from liability for loss of cargo through the careening and sinking of a vessel at the pier before she was fully loaded, due to the negligence of a watchman in failing to adjust her lines to permit her to drop with the tide;<sup>66</sup> nor can it be invoked by an owner to relieve him from liability for cargo lost while the vessel is loading, through the negligence of those in charge in permitting her to settle on the bottom and list until deck cargo fell overboard.<sup>67</sup> The provision of the Harter act exempting a vessel from liability

through its dilution by sea water while being pumped out at the port of destination, held to have been due to a sea valve connecting with one of the pumps having been left partially open, which was a fault in the management of the vessel, from liability for which the owner was protected by section 3 of the Harter act; it being affirmatively shown that the valve was in good condition and that it was properly closed when the cargo was loaded and at the commencement of the voyage. *Sun Co. v. Healy*, 163 Fed. 48, 89 C. C. A. 300.

A barge held unseaworthy, from the manner of her construction, for a voyage between St. Michael and Nome, Alaska, in October, and her owner for that reason not entitled to exemption under section 3 of the Harter act, from liability for the

loss of the cargo taken on board for such a voyage. *Parsons v. Empire Transp. Co.*, 111 Fed. 202, 49 C. C. A. 302.

**Refusal of peremptory instruction.**—Where the vessel was unseaworthy when it left port, and injury to the shipment would not have occurred but for this fact, the court properly refused a peremptory instruction for the defendant; the Harter act, exempting the owner of a vessel from liability in certain cases, applying only when he has exercised due diligence to render the vessel seaworthy. *Mallory S. S. Co. v. G. A. Bahn Diamond & Optical Co.* (Tex. Civ. App.), 154 S. W. 282.

<sup>66</sup> *Ralli v. New York & T. S. S. Co.*, 154 Fed. 286, 83 C. C. A. 290.

<sup>67</sup> *Steamship Wellesley Co. v. C. A. Hooper & Co.*, 185 Fed. 733.

for damage or loss to cargo arising from faults or errors of navigation or the management of the ship does not concern the proper stowage of cargo at the port of lading.<sup>68</sup> It does not relieve a ship from liability for damages to cargo resulting from negligence in stowage or in failing to properly cover a hatch to prevent leakage.<sup>69</sup> The Harter act does not release the owner's previous liability for loss occasioned by topheavy loading and insufficient ballasting, since the proper ballasting of a light cargo is a necessary part of the proper loading and storage of cargo, and not a part of the "management" of the ship.<sup>70</sup> Negligence in loading and stowing at a port of call, whereby the ship gets down by the head, so that sugar stowed next to wool, with a temporary bulk-head between, drains forward, and damages the wool, is not negligence "in the management of the vessel," within the meaning of the Harter act, so as to relieve the owners from liability.<sup>71</sup> Damage to the cargo of a ship on entering port could not be attributed to the wind to such an extent as to relieve the ship from liability, where she would not have been endangered but for her unstable and topheavy condition, due to the negligent and inconsiderate manner of unloading her cargo, without any regard to the great weight of ice above her deck, and to the equally negligent loading of coal on both sides, most of which was stowed above the water line, and failure to close the open port, all of which was negligence of the ship in handling the cargo, for which she was not exempted either by the Harter act or her bills of lading.<sup>72</sup> But the injury of a cargo by water by reason of the failure to close a port for which

68. *The Palmas*, 108 Fed. 87, 47 C. C. A. 220; *Dalgarno v. American Sugar Refining Co.*, Id.

69. *The Mississippi*, 120 Fed. 1020, 56 C. C. A. 525, affg. decree 113 Fed. 985.

70. *The Whitlieburn*, 89 Fed. 526.

71. Decree 76 Fed. 582, affd.; *Botany Worsted Mills v. Knott*, 82

Fed. 471, 27 C. C. A. 326, affd. *Knott v. Botany Worsted Mills*, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90.

72. *The Germanic*, 107 Fed. 294, modified 124 Fed. 1, 59 C. C. A. 521, affd. *Oceanic Steam Nav. Co. v. Aitken*, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610.

an iron shutter was provided, after the glass cover had been broken out by the seas, where the cargo was so placed that the port was readily accessible, was due to a fault or error in navigation or in the management of the vessel, within section 3 of the Harter act; and neither the vessel nor her owners are liable therefor.<sup>73</sup> So, where a ship was at the commencement of a voyage in all respects seaworthy, and properly manned, equipped and supplied, damage to a sugar cargo from fresh water which escaped into the hold where the sugar was stowed while the cargo was being discharged, by reason of a valve having been improperly left open while water from the river was being pumped into the engine tank, was due to a fault in the management of the vessel, for which she is exempted from liability by section 3 of the Harter act. Likewise, where a ship encountered such rough weather and was subjected to such strain that her deck seams opened and a part of the cargo was damaged by water, the change of her course and also the determination of the master to proceed without putting in for repairs were matters pertaining to the "navigation and management of the vessel," within section 3 of the Harter act, and not to the custody, care or proper delivery of the cargo, within the meaning of section 2, and, assuming the vessel to have been in all respects seaworthy, and properly manned, equipped and supplied at the beginning of the voyage, she was exempted by the act from liability for the damage caused or contributed to by the failure to repair.<sup>75</sup>

73. *The Silvia*, 171 U. S. 462. 19 Sup. Ct. 7. 43 L. Ed. 241; affg. judg. *Franklin Sugar Refining Co. v. Red Cross Line*, 68 Fed. 230, 15 C. C. A. 362, which affirms decree 64 Fed. 607.

74. *The Wilderoft*, 130 Fed. 521, 65 C. C. A. 145, affd. *W. J. McCahan Sugar Refining Co. v. The Wilderoft*, 201 U. S. 378, 26 Sup. Ct. 467. 50 L. Ed. 794; *The Wilderoft*, 124 Fed. 631, rehearing denied 126 Fed. 229.

75. *Corsar v. J. D. Spreckles &*

*Bros. Co.*, 141 Fed. 260, 72 C. C. A. 378; *J. D. Spreckles & Bros. Co. v. Corsar, Id.* But see *The Musselcrag*, 125 Fed. 786, wherein it was held that the failure of the master to seek a port and make repairs was not a fault or error in navigation or in the management of the vessel, within section 3, but simply a failure to use proper care for the protection of the cargo, which rendered the ship liable for the resulting damage.

Failure of those in charge of a vessel, before removing water ballast through a pipe passing through cargo compartments, to test the valves by the means provided to ascertain whether they were closed, is a neglect in the "management of the ship," within the meaning of the Harter act, and the vessel is not liable for the resulting damage to cargo.<sup>76</sup> Lack of proper attention to a vessel's pumps, which might have disclosed a leak, and prevented damage which resulted therefrom to the cargo, was negligence in the "management of the ship," for which the ship was not liable under the Harter act.<sup>77</sup> The neglect to open a sluice gate designed to empty the bilges for twenty days during heavy weather, whereby the accumulating water overflowed the bilges, and damaged the cargo properly stowed in the hold, if a fault, was one pertaining to the "management of the ship," within section 3 of the Harter act, and the ship and owners were exempted thereby from liability for the resulting damage.<sup>78</sup> Damage to a cargo of iron and wire from sea water, which entered the hold through sounding pipes, the deck plugs in which became displaced and lost in stormy weather, was proximately caused by an error in navigation, in failing to make more frequent inspection, for which the ship was exonerated from liability by section 3 of the Harter act.<sup>79</sup> Damage to cargo from water allowed to escape from a pipe in trimming the vessel by pumping out water ballast was due to fault or error in the management of the vessel within the meaning of section 3 of the Harter act, for which the owner was not liable.<sup>80</sup> When a ship is obliged, during a voyage, to put into a foreign port for repairs, owing to injuries received in a storm, an error of judgment of the master, as to the extent of repairs necessary, where he exercises

76. *Steinwender v. The Mexican Prince*, 82 Fed. 484, decree affd. *The Mexican Prince*, 91 Fed. 1003, 34 C. C. A. 168.

77. *The British King*, 92 Fed. 1018, 35 C. C. A. 159, affg. decree 89 Fed. 872.

78. *The Sandfield*, 92 Fed. 663, 34 C. C. A. 612, affg. decree 79 Fed. 371.

79. *The Newport News*, 199 Fed. 968.

80. *Jay Wai Nam v. Anglo-American Oil Co.*, 202 Fed. 822.

diligence and care, and acts in good faith, pertains to the management of the ship, within section 3 of the Harter act, and does not render the owners liable for an injury to the cargo which might have been prevented had more extensive repairs been made.<sup>81</sup> Under section 3 of the Harter act, a steamer which was seaworthy and properly manned, equipped and supplied, carrying goods between two ports of the United States, is not liable for loss or injury to such goods by reason of the barge on which they were loaded striking an obstruction in the river; the loss in such case resulting either from a danger of the river or from a fault or error in navigation or in the management of the vessel.<sup>82</sup> But, where, during the unloading of a barge in the usual manner, which caused an uneven keel for a few hours, she sprung leak, and the remaining cargo was damaged by water, such damage was not caused by fault or error in the management of the vessel within section 3 of the Harter act, but from unseaworthiness, or from negligence, fault, or failure in proper loading within section 1, for which the vessel is liable.<sup>83</sup> Where during the flooding of the hold to extinguish accidental fire, the ship grounded in the Suez Canal, and listed, so as to allow water to flow through a pipe without a stop valve, leading from the bath room of the captain's cabin, and to find its way into one of the holds, the fire was the proximate cause of the injury to the cargo in such hold, and, under Rev. St., § 4282, the shipowners were not liable therefor.<sup>84</sup> Where the ballast tank of an ocean steamer sprung leak during a voyage, and the water accumulated in the hold above in sufficient quantity to damage the cargo stowed therein; the leak was known to the engineer and carpenter, who failed to report it to the chief officer, to give it a proper examination, or to use the pumps with sufficient frequency to prevent the accumulation of water in the hold; the pump was sufficient, and the proper use of it would have prevented in-

81. *The Guadeloupe*, 92 Fed. 670.

83. *Donaldson v. J. W. Perry Co.*

82. *The Nettie Quill*, 124 Fed. 667,

138 Fed. 643, 71 C. C. A. 93.

84. *The Strathdon*, 89 Fed. 374.

jury to the cargo, such negligence was the direct cause of the injury, and constituted negligence in the "management of the ship," for which the carrier was exempted from liability by section 3 of the Harter act.<sup>85</sup>

Where a cargo of hides and similar articles shipped from South American ports to New York was found at the conclusion of an unusually long voyage, during warm weather, to be seriously damaged from decay, it was held, upon a consideration of all the evidence, that there was no damage by sea water through any leaks or imperfection of the ship, which was shown to be in good condition and thoroughly equipped for the removal of any accumulation of water in the bilges, which nothing in the circumstances of the voyage rendered excessive; that the damage was due either to an excess of moisture in the cargo before shipment, which produced the decay during the long voyage, or to an accumulation of water in the bilges because of their not having been given proper attention by reason of the sickness and death of three of the engineers from yellow fever during the voyage, in which case the failure to use the pumps was a fault in the management of the vessel, for which the owners were exempted from liability by section 3 of the Harter act.<sup>86</sup> A steamer was so improperly loaded as to render her topheavy and of slight stability of equilibrium, and to give her a decided list, when she commenced her voyage. During the voyage the list shifted from starboard to port, and back again, although she encountered no weather more severe than should reasonably have been anticipated at that season, and finally became so great that the master put into an intermediate port. While lying at a pier, and while the master was removing cargo from a side port to enable him to load more coal in the lower hold, the ship rolled over, bringing the open port under water, and she filled and sank, damaging her cargo. It was held that, even if

85. *The Ontario*, 106 Fed. 324.  
affd. *Grubnan v. The Ontario*, 115 Fed. 769, 53 C. C. A. 199.

86. *The Merida*, 107 Fed. 146, 46 C. C. A. 203.



the manner of shifting cargo was negligent, and the immediate cause of the disaster, and even if it could be considered a fault in the "management of the ship," within the meaning of the Harter act, yet it was not negligent in itself, but was rendered so only because of the unstable condition of the vessel, which must be considered the essential cause of the damage, and one for which the owner was responsible.<sup>87</sup> Where, on sailing, three out of four of the after-stanchions of the after-hatch in the lower hold of a steamship were down, and the remaining fourth stanchion, during rough weather, broke a hole through the iron cover of the ballast tank on which it rested, causing a leak which damaged the cargo and necessitated repairs at an intermediate port, during which further damage was done to the cargo, and the weight bearing on the single stanchion aft was increased by the stowage of a spare piece of shafting of three tons weight immediately over the stanchion, it was held that the extra heavy weight stowed immediately over the stanchion and the lack of the additional support of the three other stanchions designed to be used, made the ship unfit for the voyage, and was bad loading, within the first section of the Harter act, and not within the third section; and that the ship was liable for the damage.<sup>88</sup> A canal boat brought a cargo of hay from Quebec to New York, where it arrived in good condition. It was loaded by the consignor, and was to be unloaded by libelants, who had become owners of the bills of lading. On arriving in New York the boat and cargo were seized by libelants under process from the state court in a suit against the consignor, and held on demurrage for some thirty days, when the suit was dismissed, and the cargo was unloaded. During such time the weather was damp, and the hay in the hold became musty. The vessel was seaworthy, having no more leakage than was usual in such class of boats. It was held that the vessel was exempt from liability by section 3 of the Harter act, the injury having

87. *The Oneida*, 108 Fed. 886. revd.

88. *The Kate*, 91 Fed. 679.

128 Fed. 687, 63 C. C. A. 239.

arisen from an inherent defect of the thing carried.<sup>89</sup> Robbery or theft of cargo by those on board cannot be made a ground of exemption from liability of a vessel under the Harter act.<sup>90</sup>

**§ 5. Limitation of liability by contract or bill of lading.—In general.**

Exceptions in a bill of lading or charter party, introduced or inserted by the shipowners themselves in their own favor and for their own benefit, are to be construed most strongly against them.<sup>91</sup> A stipulation in a bill of lading that, if any goods cannot be found during the steamer's stay at the port of delivery, they shall be forwarded at the earliest opportunity, without liability of the ship for delay or otherwise, is invalid, under the Harter act, as applied to a case where goods were negligently stowed and no effort was made to find them, and they were subsequently lost at sea.<sup>92</sup> A stipulation exempting the carrier from liability for loss of goods "which are above the value of \$100 per package," unless their value is expressed in the bill of lading, is intended to release the carrier from any liability for packages worth more than one hundred dollars, and not merely for the excess over one hundred dollars, and is therefore void under the Harter act as well as the general maritime law.<sup>93</sup> Stipulations in a bill of lading exempting the vessel from liability for loss or injury to cargo are to be construed as operating prospectively, and not as relieving her from liability for unseaworthiness at the beginning of the voyage, unless so expressed in clear and explicit language.<sup>94</sup> Section one of the

89. *The M. C. Currie*, 132 Fed. 125.

90. *The Seneca*, 163 Fed. 591.

91. *Compania De Navegacion La Flecha v. Brauer*, 168 U. S. 104, 18 Sup. Ct. 12, 42 L. Ed. 398, affg. decree *Brauer v. Compania De Navegacion La Flecha*, 66 Fed. 776, 14 C. C. A. 88; decree, *The Queen*, 78 Fed. 155, affd. *Pacific Coast S. S. Co. v. Baneroft-Whitney Co.*, 94 Fed. 180.

36 C. C. A. 135. revd.: *The Queen of the Pacific*, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419.

92. *Calderon v. Atlas S. S. Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033, revg. decree 69 Fed. 574, 16 C. C. A. 332.

93. *Calderon v. Atlas S. S. Co.*, *supra*.

94. *The Indrapura*, 178 Fed. 591.

Harter act, which provides that any clause of a bill of lading or shipping receipt for the transportation of merchandise or property from or between ports of the United States and foreign ports, whereby the vessel owner, master, or agent shall be relieved from liability for loss or damage arising from negligence, etc., "shall be null and void and of no affect," applies to any shipment "from ports of the United States." whether to a foreign or domestic port, and is broad enough to render void a clause of a bill of lading by which the shipper waives any lien upon the vessel for any breach thereof, where it is attempted to set up such clause as a defense to a libel *in rem* to recover for loss or damage to cargo arising from negligence of the carrier.<sup>95</sup> When a charter party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a private carrier for hire, and a condition in such a contract, to which the Harter act relating to exemptions from liability has no application, exempting the shipowner from liability, on account of the carelessness of its employes, is not contrary to public policy.<sup>96</sup> A contract by a lighterage company to carry the product of a manufacturing company in and about New York Harbor, furnishing the full capacity of its vessels, made it a private carrier; and a provision of its contract that it should not be liable for goods lost or damaged, but requiring the owner to insure against such loss, is valid.<sup>97</sup> Where the bill of lading, issued for ten cases of hosiery, provided that the vessel should not be liable for exceeding one hundred dollars per case unless the value was expressed and freight paid, and the value of the missing cargo was \$768.75, the vessel was not relieved from liability for the whole loss through negligence.<sup>98</sup> Clauses in a bill

95. *The Tampico*, 151 Fed. 689.

Such a provision of a bill of lading is void, independently of statute, as against public policy, in that it would deprive the shipper in advance of one of the remedies given him by the law for a breach of contract. *Id.*

96. *The Fri.* 154 Fed. 333, 83 C. C. A. 205.

97. *The Maine*, 170 Fed. 915, 96 C. C. A. 131, revg. decree 153 Fed. 635.

98. *Hohl v. Norddeutscher Lloyd*, 169 Fed. 990.

of lading exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and are not to be extended by latitudinarian construction or forced implication, so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage.<sup>99</sup> In the absence of statutory provision to the contrary, a carrier of goods may, by special contract, contained in the bill of lading, stipulate for a more limited liability than that which the law would otherwise impose upon him.<sup>1</sup> The measure of damages for delay in delivering a cargo of merchandise, for which the vessel is liable, is the difference between the price the goods actually brought when they arrived, and the price they would have brought at the time they should have been delivered; and this measure of damages is not changed by a stipulation in the bill of lading that the shipowner is not to be liable in any case for more than the invoiced or declared value of the goods, the purpose of which is only to fix the outside limit of liability.<sup>2</sup>

A condition in bills of lading issued by a steamship company, limiting its liability in case of loss to a specified sum per package unless the value of the goods shall be expressed therein, is not an agreed valuation of the goods, and is invalid to relieve the company from liability for the full loss in case of their loss or injury through negligence, but a limitation to the invoice or declared value is reasonable and enforceable.<sup>3</sup> A provision in a bill of lading limiting a carrier's liability to the value of the goods at the place of shipment does not relieve it from a greater liability for a

99. *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181, revg. decree 68 Fed. 254, 15 C. C. A. 385.

1. *The Henry B. Hyde*, 82 Fed. 681, decree affd. 90 Fed. 114, 32 C. C. A. 534.

2. *The Styria*, 101 Fed. 728, 41 C. C. A. 639, modified 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027.

A stipulation in a bill of lading limiting the liability of the vessel to the invoice or declared value of the goods does not authorize the carrier to deduct the freight from such value in case of loss or damage. *The styria*, 93 Fed. 474.

3. *United States Ice Curtain Mills v. Oceanic Steam Nav. Co.*, 145 Fed. 701.

loss occurring through the negligence of the carrier in using an unseaworthy vessel.<sup>4</sup> Under a provision of a bill of lading for goods to be carried by water, limiting the warranty of seaworthiness of the vessels to the exercise of reasonable efforts by the carrier to make them seaworthy, such carrier is not liable for the loss of the goods, through the unseaworthiness of a barge which it had built, where it exercised reasonable care in the selection of the materials, and the designer and workmen by whom it was built.<sup>5</sup> Though a stipulation for exemption from liability be in part in contravention of law, yet such portion as is otherwise valid may be enforced.<sup>6</sup> Where a contract for the shipment of flour provided that, in consideration of a reduced freight rate, the flour was to be carried in open barges at libellant's risk, such provision did not relieve respondent from liability for loss and injury to a part of the cargo, resulting from respondent's negligent failure, for sixteen hours after discovering that the barge on which the flour was being loaded was in a leaking condition, to take steps to save the cargo from injury.<sup>7</sup> Where injury to cargo resulted from a cause excepted in the bill of lading, the carrier cannot be held responsible, unless his negligence is affirmatively shown.<sup>8</sup> Where a charter of a steamship to carry timber to be loaded at Mobile provided in the printed portion that the cargo should be brought alongside at the charterer's risk and expense, and should be signed for and taken charge of by the vessel, but a written stipulation provided that, "should it be necessary to complete the loading in the lower bay at Mobile, same to be at steamer's risk and expense," such stipulation did not render the vessel absolutely liable for

4. *Lowenstein v. Lombard*, Ayres & Co., 164 N. Y. 324, 58 N. E. 44, revg. judg. 17 App. Div. 408, 45 N. Y. Supp. 286.

5. *The Arctic Bird*, 109 Fed. 167; *a certain Barge*, Id.

6. *The Prussia*, 88 Fed. 531, decree affd. 93 Fed. 837, 35 C. C. A. 625.

7. *California Nav. & Imp. Co. v. Stockton Milling Co.*, 184 Fed. 369, 107 C. C. A. 46, affg. judg. *Stockton Milling Co. v. California Nav. & Imp. Co.*, 165 Fed. 356.

8. *The St. Quentin*, 162 Fed. 883, 89 C. C. A. 573.

timber lost while being loaded in the lower bay, but her liability as to such timber was the same as though it had been received alongside or loaded at Mobile, and exceptions in the charter party of liability for acts of God, perils of the sea, etc., applied thereto.<sup>9</sup>

The Harter act, making it unlawful to insert in bills of lading provisions relieving from liability for negligence, or to refuse to issue bills of lading containing certain statements, and subjecting violators to a fine, is a criminal statute, and such violators may be prosecuted by indictment.<sup>10</sup> The provisions of section 1 of the Harter act, making invalid contracts relieving a carrier from liability for negligence, apply to a special as well as to a common carrier.<sup>11</sup> Where, in a suit for limitation of liability arising out of a collision which resulted in the loss of the second vessel and her cargo, such vessel, although adjudged equally in fault, claimed and was awarded exemption from liability to her cargo owners under the provisions of the Harter act, her owners have no right to be subrogated to the claims of the cargo owners against the insurer of the cargo, under the "benefit of insurance" clause of the bills of lading, because the court awards the entire fund for distribution to the cargo owners in preference to the vessel owners on account of the vessel's contributing fault, on the theory that such action necessarily imposed on the vessel the liability for the loss of the cargo. In such case the payment of the claims entitled to legal preference, as permitted by admiralty rule 55, cannot be said to take anything from the holders of inferior claims, who have no interest in the fund until preferred creditors have been

9. *The Exmoor*, 163 Fed. 642.

10. *United States v. Cobb*, 163 Fed. 791.

An indictment under such act averring that such bill was issued by defendant, and setting out a copy of such bill, from which it appears that defendant's name was signed thereto "per" another, it is unnecessary to allege that it was so signed by de-

fendant's authority; that being matter of proof. *Id.*

A bill of lading for a shipment of walnut logs from a domestic to a foreign port was held to reasonably comply with section 4 of such act, and to contain no provisions violative of sections 1 and 2. *Id.*

11. *Bolton Steam Shipping Co. v. Crossman*, 206 Fed. 183.

satisfied.<sup>12</sup> Where a carrier agreed to ship goods by a certain vessel, but shipped them by another, it became an insurer and could not avail itself of any limitations of liability in the contract of shipment.<sup>13</sup> A provision in a bill of lading that meat "is to be shipped wholly at the risk of the shipper, and that the owners assume no responsibility therefor during the voyage," refers only to the voyage contemplated by the parties, and not to an additional voyage arbitrarily made by order of the owner of the ship.<sup>14</sup> Where goods are shipped by charterers under bills of lading containing the clause, "All conditions as per charter party," the receivers of the cargo and indorsees of the bills of lading take the goods subject to a charter exception of latent defects in the hull.<sup>15</sup> A ship is relieved from liability for a shortage in weight of a shipment of vegetable fiber in bales under a bill of lading containing the clause, "Not responsible for weight, nor quality, nor for loose bales," where it shows that all the bales shipped were delivered.<sup>16</sup> Memorandum books containing entries of one's experiences and observations at different times and places in the line of his business, valuable to him for reference, are "writings," within Rev. St., § 4281, relating to a large number of articles of small size, but of proportionately large value, including "writings," and providing, if a shipper shall lade them as freight on any vessel without giving notice of the true character and value thereof, the owner of the vessel shall not be liable therefor; but such memoranda are not within a like exception of the bill of lading as to "documents."<sup>17</sup>

12. *In re Lakeland Transp. Co.*, 103 Fed. 328; *The George W. Roby*, Id. Modified 111 Fed. 601, 49 C. C. A. 481.

13. *Louisville & C. Packet Co. v. Rogers*, 20 Ind. App. 594, 49 N. E. 970.

14. *Swift & Co. v. Furness, Withy & Co.*, 87 Fed. 345.

15. *American Sugar Refining Co. v. The Sandfield*, 79 Fed. 371. Decree affd. *The Sandfield*, 92 Fed. 663, 34 C. C. A. 612.

16. *The La Kroma*, 128 Fed. 936.

17. *The St. Cuthbert*, 97 Fed. 349.

**§ 6. Limitation of liability by contract or bill of lading.—Exemption from particular risks or causes of loss.—In general.**

Under a contract between a lighterage company and a manufacturer, by which the company agreed to transport property of the latter in New York Harbor and vicinity, and for such purposes furnished it the full capacity of lighters or barges when such transportation was required, as between the parties the company was a private and not a public carrier, and a provision of the contract, by which, in consideration of the making of a lower rate, the shipper agreed to exempt the carrier from liability for loss or injury to cargoes from negligence, was not within section 1 of the Harter act, but is valid and enforceable.<sup>18</sup> When a charter party gives the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a private carrier for hire, and provisions in the charter party exempting the owner from liability for injury to cargo from the negligence of officers or crew are lawful and valid.<sup>19</sup> Under a bill of lading providing that, "if all or any part of said property is carried by water over any part of said route," such water carriage shall be subject to the condition that the carrier shall not be liable for damage from fire, the fact that the goods were transported a part of the route by railroad before being loaded on shipboard would not prevent the application of the exemption from liability in case the goods were destroyed by fire while in the water carrier's possession.<sup>20</sup> The words "heat" and "heating," as used in a ship's

18. *The Maine*, 161 Fed. 401; *The Manhattan*, 161 Fed. 401.

19. *The Royal Sceptre*, 187 Fed. 224.

A provision in a charter party which makes the shipowner a private carrier exempting him from liability for negligence of master or crew does not exempt him from liability for loss of cargo by reason of the un-

seaworthiness of the ship at the commencement of the voyage, or any stage thereof, although caused by negligent loading; there being an implied, if not expressed, warranty of seaworthiness in every contract of charter. *Id.*

20. *Jennings v. Clyde S. S. Co.*, 133 N. Y. Supp. 298, 148 App. Div. 615; *Seacoast Lumber Co. v. Clyde S. S.*



bill of lading stating the causes of damage to cargo for which she should not be liable, are synonymous.<sup>21</sup> The owner of a vessel which has deviated from her voyage by his order is not relieved from liability for loss of cargo by fire during such deviation by Rev. St. U. S., §§ 4282, 4283, which exempts him from liability for fire "unless caused by the design or neglect of such owner," and limits his liability for any loss without his privity or knowledge.<sup>22</sup> A ship was not liable for damage to goat skins, a part of the cargo, where the evidence showed that the damage was due to sweat and spray; the bill of lading exempting from liability for loss from such causes.<sup>23</sup> An exemption in a bill of lading of liability for loss of cargo by theft does not relieve the vessel, where there was negligence on her part which contributed to or facilitated the theft.<sup>24</sup> Exemptions in bills of lading are not construed to cover the negligence or default of the carrier, unless it is expressly stipulated for.<sup>25</sup> It is competent for a steamship as a carrier of goods to limit its liability in case of loss, even as against its own negligence by a provision in the bills of lading that it is "not ac-

Co., 133 N. Y. Supp. 303, 148 App. Div. 622.

Under such provision of a bill of lading, a carrier by sea is not liable for the destruction of the goods by fire not the result of its negligence after delivery upon its wharf, but before notice or delivery to the consignee; the relation of carrier not having terminated. *Id.*

Loss of goods by fire upon ship-board is not included within an exception in a bill of lading exempting from liability for loss by perils of the sea. *Id.*

21. *The Good Hope*, 197 Fed. 149, 116 C. C. A. 573, affg. decree 190 Fed. 597.

22. *The Indrapura*, 171 Fed. 929.

23. *The Hudson*, 172 Fed. 1935.

24. *The Ghazee*, 171 Fed. 368, 97 C. C. A. 66.

25. *The Toronto*, 174 Fed. 632, 98 C. C. A. 386, affg. decree 168 Fed. 386.

**Strikes or stoppage of labor.**—Where a bill of lading exempted a carrier from delay occasioned by strikes or stoppage of labor "from whatever cause," and on the arrival of the ship delivery was delayed by a general longshoreman's strike, which prevented prompt delivery, which had been in progress a month before arrival, and continued after she was discharged, with which strike the carrier had nothing to do, it was entitled to the benefit of the exemption. *Id.*

countable for any sum exceeding \$100 per package for goods of whatever description, \* \* \* unless the value of such be herein expressed and freight as may be agreed paid thereon," where such valuation is the basis on which freight is charged and was fully known to the shipper.<sup>26</sup> Where on the arrival of a cargo of cocoa-nut oil, it appeared that there had been considerable leakage of the oil, and the bill of lading provided that the carrier should not be liable for leakage on the voyage, or any damage arising from the nature of the goods, prolongation of the voyage, and land damage, in the absence of proof of negligence, the ship was not liable.<sup>27</sup> Where the delay in discharging cargo was caused by a general strike of longshoremen, and a strike clause in the bill of lading provided that the ship should not be responsible for strikes and stoppage of labor, that clause constituted a defense in favor of the ship for the resulting damages.<sup>28</sup> A stipulation in a bill of lading that the carrier may convey goods in lighters to and from the ship at the risk of the owner of the goods does not apply to risks arising out of the unfitness of a lighter.<sup>29</sup> Exemptions in a bill of lading which are brought into operation by the negligence of the ship-owner or his servants are not enforceable in the courts of this country.<sup>30</sup> Stipulations in bills of lading that the carrier shall not be liable for any damage to goods which is capable of being covered by insurance will not relieve the vessel from liability for loss due to the carrier's negligence.<sup>31</sup> An open port, though unknown to the master of a vessel before sailing, was not a "latent defect," within a bill of lading exempting the carrier from loss occasioned by "latent defects, even though existing before shipment or sailing on the voyage."<sup>32</sup> A provision in a bill of lading that, if the

26. *Hohl v. Nord-Deutscher Lloyd*, 175 Fed. 444.

27. *The Neidenfels*, 174 Fed. 293.

28. *The Toronto*, 168 Fed. 386, decree affd. 174 Fed. 632, 98 C. C. A. 386.

29. *Insurance Co. of North America v. North German Lloyd Co.*, 106 Fed.

973, affd. *Nord-Deutscher Lloyd v. President, etc., of Ins. Co. of North America*, 110 Fed. 420, 49 C. C. A. 1.

30. *The Manitou*, 116 Fed. 60, affd. 127 Fed. 554, 63 C. C. A. 109.

31. *The Seaboard*, 119 Fed. 375.

32. *The Manitoba*, 104 Fed. 145.

articles named therein shall be conveyed in part by water, they shall "be subject to all customary conditions of same," does not exempt the carrier from loss by fire, on the ground that in contracts for the transportation of goods there is a well-established usage for exemptions covering loss by fire, unless it be shown that the custom is reasonable, uniform, well settled, not in opposition to fixed rules of law, nor in contradiction of the express terms of the contract.<sup>33</sup> Where during the flooding of the hold to extinguish fire, a ship grounded in the Suez Canal, and listed so as to allow water to flow through a pipe without a stop valve, leading from the bath room of the captain's cabin, and to find its way into one of the holds, the fire was the proximate cause of the injury to the cargo in such hold, and the shipowners were not liable therefor.<sup>34</sup>

A clause in a bill of lading exempting the carrier from liability for loss or damage "occasioned by causes beyond his control," following the enumeration of a large number of specific causes, including perils of the sea, fire, accidents of navigation, and others of like nature, which would be covered by such clause if given a broad construction, must be restricted in meaning to causes of the same general nature as those particularized.<sup>35</sup> A general clause in a bill of lading, exempting a shipowner from liability for loss of goods while on the quay, or loss by thieves, is not to be construed as applying to cases where such loss arises through the carrier's negligence or failure in proper custody or care, so as to render it invalid, under section 1 of the Harter act, providing that "any and all words and clauses of such import inserted in bills of lading or shipping receipts shall be null and void," nor is it rendered void, under such provision, by a subsequent clause extending all exemption provisions to cases of negligence, the two clauses being separable; but the carrier is entitled to the benefit of the exemp-

33. *Robinson v. New York & T. S. S. Co.*, 74 N. Y. Supp. 384. 36 Misc. Rep. 705. *affd.* 78 N. Y. Supp. 359. 75 App. Div. 431. *affd.* 177 N. Y. 565, 69 N. E. 1130.

34. *The Strathdon*, 89 Fed. 374.

35. *The G. R. Booth*, 91 Fed. 164, 33 C. C. A. 430, *revg. decree* 64 Fed. 878.

tion, unless it is found that its negligence or fault contributed to the loss.<sup>36</sup> The first of two causes which contributed to produce an injury to the cargo of a vessel was the proximate cause, where it was the efficient cause which set the other in operation, and that following was but its incident or necessary consequence. It is only where the causes are independent of each other that the nearest is, of course, to be charged with the disaster.<sup>37</sup> In an action to recover for damage to a cargo of rice alleged to have been received by the ship in good condition but to have been delivered at the end of the voyage in a damaged condition due to sea water and consequent heating, where the owners of the vessel clearly show that she was seaworthy and in all respects properly equipped for the carriage of the cargo at the beginning of the voyage, and also at its termination, that the cargo was properly stowed, and that there was no negligence during the voyage which would account for the entry of sea water, they have fully established a defense under a bill of lading which exempted the vessel from liability for damage from sweating, natural decay, or from sea water caused without the ship's fault or negligence.<sup>38</sup> On landing a consignment of 500 packages of firecrackers from Hong Kong, most of the boxes containing the firecrackers inside of the packages were more or less broken. The bill of lading excepted "insufficiency of packages, wear and tear and breakage." Upon proof by the vessel of good stowage, no shifting of cargo, and careful handling, and no definite cause of the injury appearing, but the boxes being frail, in appearance, with the tops and sides where the breakage occurred much thinner than the ends and bottom, it was held that the damage came within the exception of breakage; that under this exception the shipper took the risk of breakage, from whatever cause, unless the ship's negligence was shown by affirmative proof to have caused the

36. *Cunard S. S. Co. v. Kelley*, 115 Fed. 678, 53 C. C. A. 310.

37. *The G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9. 43 L. Ed. 234, Case 64 Fed. 878. certified.

38. *The Folmina*, 143 Fed. 636, affd. 153 Fed. 364, 82 C. C. A. 440, but revd. on rehearing 173 Fed. 615, 97 C. C. A. 557.

damage. No such proof appearing, the libel was dismissed.<sup>39</sup> A special written contract between a steamship company and the shipper of a horse stipulated that the company should furnish room on the steamship for the horse, and supply it with water on the passage, and that the company should be in no manner liable for any accident that should happen to the horse on board the ship by reason of the perils of the sea, sickness, disease, or any other unavoidable cause whatever, and, further, that the shipper would, at his own expense, provide stalls and food during the voyage, and proper grooms to take sole charge of the horse. During the voyage, and between ports, the ship encountered a violent hurricane, and by reason of the rolling and pitching of the ship the horse was thrown from his stall and killed. No negligence on the part of the servants of the company was shown; the death of the horse appearing to have resulted from the violence of the storm, or from the failure to provide grooms and a proper stall. It was held that the company was not liable.<sup>40</sup> Where the result should reasonably have been anticipated, and the shipkeeper was guilty of gross negligence, the owner of the vessel was liable for the injury to a cargo of wheat, while the vessel was lying in the Chicago river awaiting the opening of lake navigation in the spring, irrespective of the obligation assumed under the bill of lading to deliver the cargo safely at the port of destination, dangers of navigation, fire, and collision alone excepted.<sup>41</sup> The Austrian Steamship *Styria* loaded at an Italian port as a part of her cargo a quantity of sulphur for delivery at New York. The master issued bills of lading therefor, and on April 24, 1898, cleared; but, before sailing, war was declared between the United States and Spain. It was held that such fact constituted a "restraint of princes," within an exception in his bills of lading, which justified the master in refusing to proceed to a port of one of the belligerent powers with a cargo of sulphur, generally recognized and treated as contraband of war,

39. *The Lennox*, 90 Fed. 308.

41. *Northwestern Transp. Co. v.*

40. *New England & S. S. Co. v. Leiter*, 107 Fed. 953, 47 C. C. A. 97. *Paige*, 108 Ga. 296, 33 S. E. 969.

and that he had the right to land such cargo, with all proper precautions for safe-keeping, at the expense of the shippers, without waiting for further action of the hostile powers, thus leaving the vessel free to proceed with the remainder of her cargo; but, having learned, before he left the port, through official proclamation made by the Italian government, that the Spanish government had agreed not to treat sulphur as contraband of war until further notice, it became the duty of the master to reload the cargo so discharged, and the vessel was liable to the shippers for the damage sustained by reason of his failure to do so.<sup>42</sup>

**§ 7. Limitation of liability by contract or bill of lading.— Exemption from particular risks or causes of loss.— Manner of loading or stowage.**

A contract for the carriage of flour by which the shipper assumed risks of carriage did not relieve the barge owner from liability for loss of flour by its negligence or that of its agent in failing to properly care for the barge while being loaded.<sup>43</sup> Where a shipment of shellac from Calcutta to New York, made under a bill of lading excepting liability for loss or damage from heat, was injured by being subjected to an unusually high degree of heat, which caused it to fuse together, such fact alone is not sufficient to establish the negligence of the vessel; it being shown that it might occur without negligence, especially during the passage through the Red Sea, and that the shellac was stowed in a particularly well-ventilated part of the vessel.<sup>44</sup> A provision of a bill of lading that a shipowner shall not be liable for loss by leakage protects him as to all leakage, however great, unless caused by negligence, which must be shown to establish his liability.<sup>45</sup> The

42. *The Styria*, 101 Fed. 728, 41 C. C. A. 639, modified 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027.

43. *Stockton Milling Co. v. California Nav. & Imp. Co.*, 165 Fed. 356.

44. *The St. Quentin*, 162 Fed. 883, 89 C. C. A. 573.

45. *The Claverburn*, 147 Fed. 850, also holding that a loss through leakage of wood oil, shipped from China to New York in ordinary barrels, was not due to improper stowage but to the insufficiency of the packages, for which the carrier was not liable un-

provision of section 2 of the Harter act, making it unlawful for the owner of a ship "to insert in any bill of lading or shipping document any covenant or agreement \* \* \* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver the same shall in anywise be lessened, weakened, or avoided," relates to contracts between a carrier and shipper, and does not apply to a charter party by which a ship is demised.<sup>46</sup> Where, in an action by a shipper against a carrier for loss of oil clothing shipped under a bill of lading providing that inflammable goods might be transported on deck and should be at the shipper's risk, the evidence showed a custom to treat oil clothing as inflammable, and when carried by water to transport it on deck, the carrier was not liable for the loss of the goods in consequence of the same being washed overboard.<sup>47</sup> Damage to wool stowed on the forward side of a temporary wooden bulkhead, by drainage from sugar stowed aft of the bulkhead, when it results from the fact that for a short time the vessel was trimmed by the head after discharging a part of the cargo, until she was again trimmed by the stern at another port, arises from negligence in loading or stowage of cargo, which makes the vessel liable under Harter Act, Feb. 13, 1893, § 1, notwithstanding any stipulations to the contrary in the bills of lading; and it is not a damage from fault or error in the navigation or management of the ship.<sup>48</sup> A ship is liable for damage to cargo, resulting from negligence in stowage, or in failing to properly cover a hatch to prevent leakage, notwithstanding any stipulations to the contrary in the bills of lading.<sup>49</sup> If taking a cargo to a vessel in lighters be part of the loading of the vessel, a stipulation in the

der the terms of the bill of lading, it being shown that such oil has a tendency to shrink the barrels and cause leakage unless they are specially prepared.

46. *Golear S. S. Co. v. Tweedie Trading Co.*, 146 Fed. 563.

47. *A. J. Tower Co. v. Southern*

*Pac. Co.*, 195 Mass. 157, 80 N. E. 809.

48. *Knott v. Botany Worsted Mills*, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90, affg. decree 82 Fed. 471, 27 C. C. A. 326.

49. *The Mississippi*, 120 Fed. 1020, 56 C. C. A. 525, affg. decree 113 Fed. 985.

bill of lading relieving the carrier from failure to provide a fit lighter is prohibited by Harter Act, Feb. 3, 1893, § 1, declaring it unlawful for the owner of a vessel engaged in transporting merchandise to stipulate against liability for loss from negligence in loading.<sup>50</sup> Loss of cargo, resulting from the overloading of a lighter, due to negligence of officers of the ship, is within section 1 of the Harter act, and not within section 3, and cannot be relieved against by a stipulation in the bills of lading.<sup>51</sup> A provision in a bill of lading relieving a shipowner from liability for the negligence of stevedores and persons in his employ is ineffective, and will not be enforced in the federal court of admiralty.<sup>52</sup> Where a ship, after loading part of a cargo of tea, took on at another port a large consignment of tanned skins, having a strong odor, which were stowed in the same hold with a portion of the tea, and during the voyage the tea became impregnated with the odor, and was thereby damaged; and it became necessary during the voyage, owing to a threatened storm, to remove the ventilators

50. Insurance Co. of North America v. North German Lloyd Co., 106 Fed. 973. affd. Nord-Deutscher Lloyd v. President, etc., of Ins. Co. of North America, 110 Fed. 420, 49 C. C. A. 1.

51. The Seaboard, 119 Fed. 375.

52. The Oreadian, 116 Fed. 930.

A shipowner is not relieved from liability for injury to goods caused by improper stowage by a limitation of liability in the bill of lading, declaring that the vessel shall not be answerable for damage caused by any act of omission, negligence, malfeasance, default, or error of judgment of the stevedores or other persons in the service of the shipowners; improper stowage, whether due to carelessness or a mistake in judgment on the part of the stevedores, being a fault in improperly loading the cargo for which the vessel is liable. *Id.*

Where a cargo of licorice root was damaged in shipment, because in loading, the stevedores, who were under the direction and control of the master, broke open a large number of the bales and stored the root in unusual places, where it received injury, the ship was liable for the damage, and could not avoid such liability by a notation, placed on the bill of lading at the instance of the master, stating that the ship was not responsible for broken or cut bales; such notation being void under section 1 of the Harter act, which makes it unlawful to insert in a bill of lading any clause relieving the ship from liability for damages "arising from negligence, fault, or failure in proper loading, stowage," etc. *Bethel v. Mellor & Rittenhouse Co.*, 131 Fed. 129.



from such hold, and to plug the openings for twenty hours, and the ship claimed that the damage, if any, occurred at that time, and was from a danger of navigation, within exceptions in the bills of lading and section 3 of the Harter act, the proximate cause of the loss was the negligent stowage, for which the ship was not exempted from liability.<sup>53</sup>

**§ 8. Limitation of liability by contract or bill of lading.—Exemption from particular risks or causes of loss.—Perils of the seas.**

Rough seas, although not extraordinary, are sea perils, and, if sufficient to account for damage to cargo properly stowed, the loss is within the exception of such perils in bills of lading.<sup>54</sup> Where a shipping contract excepted acts of God, other words of exemption from liability for injury from storms are not needed.<sup>55</sup> "Dangers of navigation" or "perils of the sea," as used in bills of lading or concerning shipping, mean only those dangers which are inevitable, and do not excuse the vessel from liability for loss caused by negligence.<sup>56</sup> Where during the voyage burlap bags containing walnuts, stowed with other cargo without partitions, were torn and the walnuts were lost or damaged, and the voyage was rough, but no more so than should reasonably have been anticipated at the season, the loss was not due to perils of the sea, within the exceptions

53. *The Hudson*, 122 Fed. 96.

The loading of drums of glycerine, under the circumstances of the case, was held to constitute such improper loading as rendered the vessel unseaworthy at the time of sailing, and the damage resulting not within exceptions in the bill of lading against "unseaworthiness" or "damage by leakage, breakage, or contract with other goods," since the bill of lading also bound the owners to the exercise of "due diligence to render the vessel seaworthy:" nor were they, for the

same reason, relieved from liability by section 3 of the Harter act, which does not cover negligence in loading, stowing, or ballasting the ship. *The Frey*, 92 Fed. 667.

54. *The Newport News*, 199 Fed. 968.

55. *Unique Shipping Co. v. J. M. Guffey Petroleum Co.*, 169 Fed. 905, decree affirmed 177 Fed. 1005, 100 C. C. A. 200.

56. *Pettyjohn v. Oregon Coal & Nav. Co.*, 58 Or. 392, 113 Pac. 438.

in the bills of lading, but to negligent stowage, for which the vessel was liable.<sup>57</sup> A ship cannot by bill of lading exempt herself from liability for damage to cargo from sea water, as a peril of the seas, where such water entered because of the obstruction of a valve, due to the failure to exercise due diligence in the equipment of the ship at the beginning of the voyage.<sup>58</sup> But damage to cargo caused by sea water which entered through a hatch during a voyage across the Atlantic by a new steamer, was not due to the unseaworthiness of the vessel or any defect in the hatch covers, but to perils of the sea, for which the vessel and owners were not liable under the bill of lading; it being shown that the tarpaulin hatch covers were new and sufficient and properly secured, but that the one above libellant's goods was injured by a cut through the breaking loose of a derrick at night during a very severe storm.<sup>59</sup> Under a charter to carry a cargo which provided that the owner should provide a seaworthy boat, a further provision exempting him from "marine risks" did not relieve him from liability for cargo which was dumped from the deck by the listing of the vessel due to excessive or uncared for leakage.<sup>60</sup> Where on a voyage from a Canadian port on Lake Superior to Buffalo, a steamer's cargo of wheat was damaged by water escaping from a feed pipe connecting with the engine and boiler rooms, which was broken at a joint, and the use of such feed pipe and the manner in which it was constructed and cased were not unusual on such steamers, and an inspection a month earlier, and a further inspection by the officers and shipper's agent before loading, showed it to be in good condition, it did not render the vessel unseaworthy at the beginning of the voyage, but under the evidence the breakage was due to perils of navigation, which strained the vessel during the voyage, and which were within the exceptions in the bill of lading; it being shown that she encountered unusually rough weather and was otherwise

57. *The Trignac*, 169 Fed. 682.

58. *The Brilliant*, 159 Fed. 1022,  
86 C. C. A. 671, affg. decree 138 Fed.  
743.

59. *Gough v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft*,  
158 Fed. 174.

60. *The Dana*, 190 Fed. 650.

strained.<sup>61</sup> Where it is shown that a wooden vessel was seaworthy at the inception of her voyage, that the cargo was properly stowed and protected, that she was properly provided with pumps and the same were properly worked, that her hatches were properly secured, and that she encountered on her voyage heavy seas of unusual violence adequate to strain her seams and cause her to take in an unusual quantity of water, damage to her cargo therefrom, which it is not shown could have been avoided by the exercise of ordinary skill and care, is within the exception of "dangers of the sea" in the bill of lading, for which she is not liable.<sup>62</sup> Damage to cargo from water escaping from a ballast tank which had become buckled was not due to perils of the sea, within the exception in the bill of lading.<sup>63</sup>

By the law of both England and America the ordinary contract of a common carrier by sea involves an obligation to use due care and skill in navigating the vessel and carrying the goods; and an exception, in the bill of lading, of perils of the sea, or other specified peril, does not excuse him from that obligation, nor exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed.<sup>64</sup> Generally speaking, the words "perils of the sea" have the same meaning in a bill of lading as in a policy of insurance, although the effect of negligence of the master or crew contributing to the loss by a peril of the sea may be different on the two contracts.<sup>65</sup>

61. *The Rappahannock*, 173 Fed. 829.

62. *Cook v. Southeastern Lime & Cement Co.*, 146 Fed. 101.

63. *The Charlton Hall*, 207 Fed. 343.

64. *Campania De Navegacion La Flecha v. Brauer*, 168 U. S. 104, 18 Sup. Ct. 12, 42 L. Ed. 398, affg. decree *Brauer v. Campania Navegacion La Flecha*, 66 Fed. 776, 14 C. C. A. 88.

A wrongful jettison of sound cat-

tle by order of the master, from unfounded apprehensions, during rough weather, is not a "loss or damage occasioned by causes beyond his (the carrier's) control, by the perils of the sea, or other waters," or "by collisions, stranding, or other accidents of navigation," in the meaning of the bill of lading. *Id.*

65. *The G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234. *Case* 64 Fed. 878, certified.

Where a box of detonators stowed

Damage to cargo by sea water entering the hold around a loose rivet, which had been fractured by perils of the sea, is a loss by perils of the sea within the exceptions of a charter party and bill of lading.<sup>66</sup> The loss of logs which broke loose from a raft by reason of a high wind, after they had been towed out to a steamer for loading in the open sea, was due to a peril of the sea, within an exemption in the bill of lading, and the steamer is not liable therefor.<sup>67</sup> Damage to a cargo of flaxseed on a voyage from Duluth to Buffalo, caused by water, was not due to unseaworthiness of the vessel at the commencement of the voyage, but to dangers of the sea, against which the carrier was protected from liability by the conditions of the bills of lading; it being clearly shown that the vessel, which was new, had been recently overhauled, and was in every respect in the best condition and properly equipped, having the highest rating, and it being further shown that on the voyage she encountered unusually severe gales and heavy seas, which caused her seams to start from the strain.<sup>68</sup>

**§ 9. Limitation of liability by contract or bill of lading.—Exception from particular risks or causes of loss.—Unseaworthiness or defective equipment or apparatus.**

In an action for loss of cargo, a contention on the part of the

in the hold of a vessel, as a part of the cargo, exploded, tearing a hole in the side of the vessel, through which the sea water immediately entered, and, penetrating into the next compartment, damaged a consignment of sugar, the explosion, and not the inflow of water, was the proximate and responsible cause of the damage, which was not, therefore, occasioned by a peril of the sea, within the exception from liability contained in the bill of lading. *Id.*

The vessel having reached her port of destination, and being engaged in

unloading, at the time of the explosion, the damage would not come within a provision of the bill of lading exempting the carrier from liability for loss or damage occasioned by an "accident of navigation." *Id.*

66. *American Sugar Refining Co. v. The Sandfield*, 79 Fed. 371, decree *affd.* *The Sandfield*, 92 Fed. 663, 34 C. C. A. 612.

67. *Munson S. S. Line v. E. Steiger & Co.*, 132 Fed. 160, decree *affd.* 136 Fed. 772, 69 C. C. A. 492.

68. *Davidson S. S. Co. v. 119,254 Bushels of Flaxseed*, 117 Fed. 283.

respondent that its liability should be limited to the value of the boat will not be sustained, where the responsible agent of the company neglected to avail himself of an opportunity to ascertain the unseaworthy condition of the boat.<sup>69</sup> The owner cannot limit its liability for damages to a cargo arising from unseaworthiness due to a negligent examination.<sup>70</sup> Exceptions in a bill of lading of damage from "latent defects in hull," etc., do not include unseaworthiness existing at the inception of the voyage, and at the time the bill of lading was signed, and resulting from a latent defect in a rivet in a water tank.<sup>71</sup> Stipulations in a bill of lading cannot relieve a carrier from the discharge of his initial duty under the Harter act to use due diligence to furnish a seaworthy vessel.<sup>72</sup> A stipulation in a contract of affreightment exempting the vessel from liability for loss and damage to the cargo occasioned by any latent defects in the hull of the vessel does not extend to such as were in existence at the commencement of the voyage; nor does the provision of section 3 of the Harter act, by which, if the owner has exercised due diligence to make the vessel in all respects seaworthy, neither he nor the vessel is liable for losses arising from dangers of the sea, relieve the owner or the vessel from the consequences of unseaworthiness at the inception of the voyage, though due diligence be shown.<sup>73</sup> A stipulation, in a contract for the transportation of frozen meat, exempting the carrier from liability for loss or damage to the cargo in consequence of latent defects in such apparatus, which is not due to any fault or negligence on his part, is not in violation of section 2 of the Harter act.<sup>74</sup> A pro-

69. *Saunern v. Wright & Cobb's Lighterage Co.*, 171 Fed. 449, decree affd. 179 Fed. 1021, 102 C. C. A. 666.

70. *Braker v. F. W. Jarvis Co.*, 166 Fed. 987.

71. *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181, applying *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644, and revg. 68 Fed. 254, 15 C. C. A. 385.

72. *Martin v. The Southwark*, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65, revg. judg. *The Southwark*, 108 Fed. 880, 48 C. C. A. 123.

73. *The Sandfield*, 92 Fed. 663, 34 C. C. A. 612, affg. decree 79 Fed. 371.

74. *The Prussia*, 93 Fed. 837, 35 C. C. A. 625, affg. decree 88 Fed. 531.

A carrier by water, who accepts a cargo of frozen meat for transporta-

vision of a bill of lading that the ship is not to be answerable for loss through any "latent defect in the machinery or hull not resulting from want of due diligence by the owners" does not cover a condition of unseaworthiness existing at the commencement of the voyage, but applies only to a state of unseaworthiness arising during the voyage.<sup>75</sup> A ship cannot by bill of lading exempt herself from liability for damage to cargo from sea water, as a peril of the seas, where such water entered because of the obstruction of a valve, due to the failure to exercise due diligence in the equipment of the ship at the beginning of the voyage.<sup>76</sup> Stipulations in a bill of lading against liability for loss or damage to cargo through dangers of the sea or leakage do not exempt the shipowner from liability for damage caused by sea water which enters through the deck by reason of its defective condition, which renders the vessel unseaworthy for the particular voyage and cargo.<sup>77</sup> Stipulations in a bill of lading for cattle to be carried by ship, exempting the carrier from liability for accident to the cattle, or any mortality, "from whatever cause arising," and that the shippers accepted the fittings and fastenings as satisfactory, do not relieve the carrier, under the provisions of the Harter act, from the duty of exercising due diligence to properly equip and outfit the vessel, and to make her seaworthy, and capable of performing her intended voyage, nor lessen or avoid the obligation to properly stow the cattle; but the

tion across the ocean, impliedly contracts that his vessel is provided with suitable and efficient apparatus to enable him to deliver the cargo in proper condition; but it is competent for the parties, by express contract, to stipulate for the exemption of the carrier from liability for loss or damage to the cargo in consequence of latent defects in such apparatus which are not due to any fault or negligence on his part, or on the part of those for whom he is responsible. *Id.*

A provision in a bill of lading that

the risk of due refrigeration of meats shall be borne by the shipper, though damage be caused by neglect of the carrier's servant, does not excuse the carrier from the duty of reasonable care to provide a proper refrigerating plant. *Id.*

75. *The Aggi*, 107 Fed. 300, 46 C. C. A. 276.

76. *The Brilliant*, 138 Fed. 743. *affd.* 159 Fed. 1022, 86 C. C. A. 671.

77. *The Nellie Floyd*, 116 Fed. 80 *affd.* *Neilson v. Coal, Cement & Supply Co.*, 122 Fed. 617, 60 C. C. A. 175.

burden rests upon the shipper to affirmatively prove negligence in such respects to charge the carrier with liability for cattle which were killed or washed overboard during a storm of such violence that it might well have caused the loss if the vessel were seaworthy and properly fitted and loaded.<sup>78</sup> Where a bill of lading adopted the exemptions from liability for loss contained in the Harter Act, Feb. 13, 1893, a provision that the exemptions therein "shall apply, not only during the loading and voyage, but during the discharge and until the goods are actually delivered to consignee," did not extend the shipowner's exemptions, so as to exclude liability for losses resulting from the unseaworthy condition of the ship; this not being an exemption under the statute.<sup>79</sup> Where sugar in the hold of an iron steamship was damaged by water coming in through a small hole made by corrosion of the acid of sugar drainage and sea water, which reached the plate through cracks in the lining of Portland cement, in the inspection prior to the voyage, a failure to take up one of four ceiling boards in a passageway over the limber spaces, underneath which the leak occurred, in order to examine the cement, was a lack of "due diligence" and "reasonable means" to make the ship seaworthy, and the carrier was not exempted under the Harter act or the bill of lading.<sup>80</sup> Where a steamer encountered heavy weather in crossing the Atlantic, during which the seams of the ballast tank, which was constructed of iron plates riveted together, were sprung, and two rivets were lost, permitting a leakage into the hold above, by which a portion of the cargo was injured, and the leak, in the opinion of experts, was caused by the strain of the ship in the heavy weather during the voyage, and there was no evidence contradicting such opinion or to show that the rivets lost were in any way defective in material or workmanship, under a bill of lading providing that the owners should not be accountable for the unseaworthiness of the vessel at the commencement of the voyage if all reasonable

78. The *Tjomo*, 115 Fed. 919.

79. The *Manitoba*, 104 Fed. 145.

80. The *Alvena*, 79 Fed. 973, 25 C. A. 261, affg. 74 Fed. 252.

means had been taken to provide against such unseaworthiness, the shipowners would be exonerated from injury to the cargo.<sup>81</sup>

**§ 10. Limitation of liability by contract or bill of lading.— Requirements as to notice and time to sue vessel.**

Provisions of bills of lading requiring claims for loss or damage to cargo to be presented to the carrier within a stated time, and barring any suit for such loss or damage unless commenced within a further stated time, will be enforced by the courts only so far as they are reasonable under the circumstances of the particular case, and such requirements may also be waived by the carrier by his conduct.<sup>82</sup> A provision in a bill of lading that the shipowner shall not be liable "for any damage to goods \* \* \* notice of which is not given before the removal of the goods," construed to mean "before removal" from the ship's custody and control, is lawful and valid; and a shipper under such a bill, seeking to recover for damage to cargo, must show a compliance with its terms.<sup>83</sup> A provision in a bill of lading that "neither the steamship owners nor their agents nor any of their servants are liable \* \* \* for any claim, notice of which is not given before the removal of the goods" is to be construed as requiring such notice to be given before the removal of the goods from the dock, and imposed a valid condition precedent to the right to recover for damage to cargo either against the owners personally, or by a suit *in rem*, where, under

81. *The Ontario*, 106 Fed. 324, affd. *Grubman v. The Ontario*, 115 Fed. 769, 53 C. C. A. 199.

82. *Pacific Coast Co. v. Yukon Independent Transp. Co.*, 155 Fed. 29, 83 C. C. A. 625, also holding that the libellant had made reasonable compliance with the terms of the bill of lading as to notice, and that the delay in bringing suit was waived by the carrier by entertaining the claim and continuing negotiations for its settlement.

The failure of the owners to insist on the condition in other cases does not constitute a waiver in favor of libellant, where it is not shown that he knew the fact and was misled by it. *The Westminster*, 127 Fed. 680, 62 C. C. A. 406, affg. decree 116 Fed. 123.

83. *The Persiana*, 185 Fed. 396, 107 C. C. A. 416, revg. decree 156 Fed. 1019.



the circumstances of the case, such condition is just and reasonable—as where the damage was known when the cargo was discharged.<sup>84</sup> A stipulation, in a bill of lading for goods carried by ship, that all claims for damages against the steamship company or its stockholders must be presented within thirty days, applies to a libel against the ship itself, as well as to claims *in personam* against the owners.<sup>85</sup> A provision in a bill of lading requiring all claims for damages to be presented within thirty days from the date thereof makes the period of limitation unreasonably short, and is therefore void.<sup>86</sup> A stipulation for notice of loss within thirty days from date of shipment, in a bill of lading for goods carried by ship from San Francisco to San Pedro, is not unreasonable as applied to a loss which was known to the consignors more than three weeks before the expiration of the stipulated time, since the enforcement of the stipulation in such a case would not work a manifest injustice.<sup>87</sup> A carrier of goods has the right to provide by contract that any claim for damages on account of loss or injury to the goods in shipment shall be presented within a reasonable time therein fixed, as a condition precedent to a right to maintain an action thereon, and a provision in a bill of lading requiring such presentation within ten days after the shipper has notice of the loss or injury is reasonable, and will be enforced.<sup>88</sup> A provision in a bill of lading that the carrier shall not be liable for any claim for loss or damage “unless presented within forty-eight hours after

84. *The Westminster*, 127 Fed. 680, 62 C. C. A. 406, affg. decree 116 Fed. 123; *The St. Hubert*, 107 Fed. 727, 46 C. C. A. 603; *The Westminster*, 102 Fed. 366.

85. *The Queen of the Pacific*, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419, revg. *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 36 C. C. A. 135, which affirms *The Queen*, 78 Fed. 155. *Contra*, *The Queen of the Pacific*, 75 Fed. 74.

86. *Decree The Queen*, 78 Fed. 155,

affd. *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 36 C. C. A. 135, revd. *The Queen of the Pacific*, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419.

87. *The Queen of the Pacific*, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419, revg. decree *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 36 C. C. A. 135.

88. *The Arctic Bird*, 109 Fed. 167; *A Certain Barge*, 109 Fed. 167.

landing of or failure to deliver the goods," does not preclude a recovery for shortage of cargo, although no claim therefor was made within the specified time after discharge, where the ship placed the cargo in store, taking receipts therefor, and as soon as the shortage came to the attention of the consignee it presented a claim therefor to the agent of the line in whose name the bill of lading was issued, who admitted liability.<sup>89</sup> A provision in a bill of lading that the vessel should not be liable for damage to the cargo unless written claim for the loss should be made within thirty days is sufficiently complied with by a letter sent to the carrier within thirty days by the proctor for the cargo owner, stating that he held a claim for damage to the cargo for collection, where both parties had actual knowledge of the damage at the time of discharge.<sup>90</sup> A stipulation in a bill of lading against liability for loss or damage unless suit shall be brought within three months is valid.<sup>91</sup>

### § 11. Persons liable for loss or damage.

Where the agent of a steamship company, to facilitate unloading, employed a lighter without covers and agreed on behalf of the steamship company to furnish the covers, which he failed to do, resulting in injury to the cargo from rain, the lighter was not liable *in rem*, but the agent was primarily, and the steamship company secondarily, liable.<sup>92</sup> Where a shipment of wool was wetted and injured by contact with other wet wool on the lighter or the terminal steamship, and it was impossible to determine how much of the damage each contributed, they would be required to share the

89. *The Niceto*, 134 Fed. 655. See *The Naranja*, 104 Fed. 160, wherein it was held that, under the terms of the contract and the facts shown, the vessel was not liable for a shortage, it being shown that all the bags shipped were delivered on the dock.

90. *The D. Harvey*, 139 Fed. 755;

*Erie Boatmen's Transp. Co. v. General Supply and Construction Co.*, 139 Fed. 755.

91. *Ginn v. Ogdensburg Transit Co.*, 85 Fed. 985, 29 C. C. A. 521.

92. *The Seven Brothers No. 1*, 203 Fed. 21.

loss between them.<sup>93</sup> Where defendant, having contracted not to place more than \$100,000 worth of plaintiff's goods on any one of its vessels for transportation at one time, and with knowledge that plaintiff's insurance was limited to \$100,000 worth of goods on any one steamer at any one time, in violation of the contract loaded an assembled shipment valued at \$349,426.70 without plaintiff's knowledge on a single vessel, which shipment sustained a damage of \$85,966.70, since the insurance company was only liable for such a proportion of the loss as \$100,000 bore to the whole value of the goods shipped, the defendant was responsible for breach of contract for the balance of the loss.<sup>94</sup> Where an ocean carrier undertook to transport goods, and employed a lighterage company for the service, they are jointly liable for a loss of the goods through the negligence of the lighterage company.<sup>95</sup> The consignee of a cargo, having assumed by his contract the duty of furnishing towage, cannot relieve himself from liability for the manner in which it is performed by the employment of a towing company, and is responsible to the vessel for any damage or injury caused by the negligent manner in which the service is performed by such company.<sup>96</sup> A supercargo, who, for a valuable consideration in the nature of a commission, undertakes to be responsible for all risks except danger of the seas, is liable to the consignor for the value of goods which are stolen after being landed at the port of discharge and before any sale.<sup>97</sup> Where a shipmaster agreed to take the defendant's schooner, for the purpose of getting employ in the freighting business, and engaged "to victual and man her, and pay half of all port charges, pilotage, etc., and the defendant engaged to pay the other half, together with eight dollars per month for one man's wages, and to put the schooner in sufficient order for the business, and all money

93. *Sanbern v. Panama R. Co.*, 205 Fed. 348.

94. *Hood Rubber Co. v. Rutland Transit Co.*, 16 Fed. 790.

95. *Smith v. Booth*, 122 Fed. 626,

58 C. C. A. 479, affg. decree 110 Fed. 680.

96. *Thompson v. Winslow*, 128 Fed. 73.

97. *Bridge v. Austin*, 4 Mass. 115.

so stocked in the schooner, whether for freight or passage, or whatever, was to be equally divided between the master and defendant, each party accounting for the above," the master was owner *pro hac vice*; the contract did not make him and the defendant partners; and the defendant was not answerable to a shipper of goods which had not been delivered according to the bill of lading.<sup>98</sup> Section 3 of the Harter act, which provides that if the shipowner exercised due diligence to make the vessel seaworthy, etc., neither the vessel nor her owners shall be responsible for faults or errors in her navigation or management, does not give an owner who has exercised such diligence a right to contribution in general average for sacrifices made to save vessel and cargo, when stranded through negligence of the ship's officers.<sup>99</sup> Although the owners of a vessel have been adjudged exempt from liability for damage to cargo resulting from fire due to the negligence of one of the crew, under section 3 of the Harter act, on the ground that they exercised due diligence to make the vessel seaworthy and in fit condition for the voyage, and were without personal negligence or fault, they cannot maintain an affirmative action against the owners of the cargo for contribution in general average to the ship's loss; but where they are invited to such an adjustment by an action brought by the sole owner of the cargo, the ship's loss must be taken into consideration, as the effect of excluding it would be to make the same act for which they are acquitted of responsibility by the statute the basis of an indirect recovery of a part of the damage which was in issue in the direct action.<sup>1</sup>

## § 12. Carriage of passengers.—Personal injuries.—Limitation of liability.

The provisions of section 2 of the Harter act as to the limit-

98. *Cutler v. Winsor*, 23 Mass. (6 Pick.) 335, 17 Am. Dec. 385. See *Denny v. Cabot*, 47 Mass. (6 Mete.) 90.

187, 18 Sup. Ct. 831, 43 L. Ed. 130. revg. *Chrystal v. Flint*, 82 Fed. 472. 1. *The Strathdon*, 94 Fed. 206, affd. 101 Fed. 600, 41 C. C. A. 515.

99. *Flint v. Christall*, 171 U. S.

ing of liability by bills of lading or shipping documents do not apply to passenger tickets.<sup>2</sup> Injuries to passengers and claims for loss or damage to their personal baggage, not shipped as merchandise and not paying freight, are not within the exemptions of the Harter act.<sup>3</sup> Where the president of a steamship company was present in a small boat sent ashore by one of the company's ships, and acquiesced in the act of the officer in charge in negligently permitting the boat to be overloaded, in consequence of which it was swamped, and a number of the passengers were drowned, such negligence of the officer was with "the privity or knowledge" of the company, which is not entitled to a limitation of its liability for claims arising out of the disaster, under Rev. St. U. S., §§ 4283-4285.<sup>4</sup> A provision of a steamship ticket exempting the carrier from responsibility for its own or its agents' negligence, provided it has used due diligence to make the vessel seaworthy, is void, as against public policy.<sup>5</sup> A provision in a passenger's ticket that neither the ship, the shipowner, nor the agent is responsible, beyond the amount of \$100, for loss of or injury to passengers arising from latent defects in the steamer, or default or negligence of the shipowner's servants, in unreasonable and invalid.<sup>6</sup> The provision in a contract for ocean transportation that the carrier will not be liable for delay from "restraints of princes, rulers, and peoples" does not exempt the carrier from liability for negligence in failing to furnish sufficient

2. Decree 88 Fed. 331, *affd.* The Kensington, 94 Fed. 885. 36 C. C. A. 533, which is reversed 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190.

3. In *re* California Nav. & Imp. Co., 110 Fed. 678; The Rosendale, 88 Fed. 34; The Oregon, *Id.*; *judge. affd.* 92 Fed. 1021, 35 C. C. A. 167; The Rosendale, *Id.*; In *re* Brooklyn & N. Y. Ferry Co., *Id.*; In *re* Bridgeport Steamboat Co., *Id.*; The Kensington, 88 Fed. 331, *decree affd.* 94

Fed. 885, 36 C. C. A. 533, and *revd.* 183 U. S. 263. 22 Sup. Ct. 102, 46 L. Ed. 190.

4. *Weisshaar v. Kimball S. S. Co.*, 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A. 84, *judg. In re* Kimball S. S. Co., 123 Fed. 838, *revd.*

5. The Oregon, 133 Fed. 609, 68 C. C. A. 603.

6. *Moses v. Hamburg-American Packet Co.* Fed. 329.

and suitable food and lodging, which it undertook to furnish, during a quarantine required by the government.<sup>7</sup>

§ 13. Carriage of passengers.—Passengers' baggage or effects.  
— Limitation of liability.

A stipulation in a steamship passenger's ticket, which compels him to value his baggage at a certain sum, far less than it is worth, or, in order to have a higher value put upon it, to subject it to the provisions of the Harter act, by which the carrier would be exempted from all liability therefor from errors in navigation or management of the vessel or other negligence, is unreasonable and in conflict with public policy.<sup>8</sup> An arbitrary limitation of 250 francs for the baggage of any steamship passenger, unaccompanied by any right to increase the amount by adequate and reasonable proportional payment, is void as against public policy.<sup>9</sup> A provision in a passenger ticket relating to a limitation of the carrier's liability for loss of baggage, plainly printed on the face of the ticket above the signatures of the ship's agent and the passenger, is a part of the contract.<sup>10</sup> Such a provision, though in terms limiting the liability of the "shipowner or agent" only, inures to the benefit of the ship itself, when sought to be held by proceedings *in rem* solely on the ground that the owner did not fully perform the contract.<sup>11</sup> It is competent for carriers by sea to limit their liability for passengers' baggage to a specified sum, unless higher rates are paid for any excess in value; and when this provision is plainly incorporated in the body of the ticket, and ample opportunity is afforded the passenger to know it and comply with it, it becomes binding on him.<sup>12</sup> A condition in a steamship ticket

7. *Larsen v. Allan Line S. S. Co.*, 37 Wash. 555, 80 Pac. 181.

8. Decree 94 Fed. 885, 36 C. C. A. 533, revd. The Kensington. 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190.

9. Decree 94 Fed. 885, 36 C. C. A. 533, revd. The Kensington, *supra*.

10. Decree 88 Fed. 331, *affd.* The

Kensington, 94 Fed. 885, 36 C. C. A. 533, which is revd. 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190.

11. Decree 88 Fed. 331, *affd.* The Kensington, 94 Fed. 885, 36 C. C. A. 533, which is revd. 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190.

12. The Kensington, 88 Fed. 331,

limiting the liability of the carrier for loss of baggage to a stated sum, does not apply to extra baggage taken and paid for as such under a subsequent agreement, nor will such a condition be enforced where the sum named bears such relation to the quantity of the baggage and the sum paid for its carriage as to render the limitation manifestly unreasonable.<sup>13</sup> A notice or memorandum printed on the back of a steamship ticket purporting to limit the liability of the carrier for loss of baggage, not referred to in the body of the ticket nor called to the attention of the purchaser, is simply a notice, and forms no part of the contract.<sup>14</sup> A clause of a steamship ticket headed "Notice," limiting the liability of the vessel or owners to \$100 for loss of the passenger's personal effects, is not a part of the contract, and does not relieve the owner from full liability, where it was not read by or made known to the passenger.<sup>15</sup> Where plaintiff bought a round-trip steamship ticket which limited the carrier's liability for loss of baggage to \$100, and, months after the purchase, had a trunk checked on the return portion of the ticket, and the trunk was lost through the carrier's negligence, the carrier was entitled to insist on the limitation of liability.<sup>16</sup> Where plaintiff engaged passage on defendant's boat, the contract limiting defendant's liability for loss of baggage, and on the day of sailing defendant refused plaintiff passage on its boat, but engaged for him passage on another, which plaintiff accepted, but his baggage went on the first boat, plaintiff having waived defendant's breach of contract by accepting passage on the other boat, instead of rescinding the contract, as he could have

decree *affd.* 94 Fed. 885, 36 C. C. A. 533, which is *revd.* 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190.

13. *La Bourgogne*, 144 Fed. 781, 75 C. C. A. 647, *affd.* *Deslions v. La Compagnie Generale Transatlantique*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973.

14. *La Bourgogne*, 144 Fed. 781,

75 C. C. A. 647, *affd.* *Deslions v. La Compagnie Generale Transatlantique*, *supra*.

15. *Smith v. North German Lloyd S. S. Co.*, 142 Fed. 1032, *affd.* 151 Fed. 222, 80 C. C. A. 574.

16. *Lindsey v. Maine S. S. Co.*, 88 N. Y. Supp. 371.

done, he is bound by the limitation as to the loss of his baggage in the original contract.<sup>17</sup> A limitation in a ticket sold by a steamship company of the recovery of damage to passenger's baggage to \$100 was valid.<sup>18</sup> A passenger was bound by a limitation of damages for loss of baggage in his ticket, though the terms were not directly brought to his attention;<sup>19</sup> and though he could not speak or read the language in which the tickets were printed.<sup>20</sup> A passage ticket for an ocean voyage is a contract, and not a mere token, and hence the mere fact that the purchaser did not notice a clause therein limiting the steamship's liability for loss or damage to baggage to \$50, unless the full value was disclosed and freight paid, did not exempt the passenger from enforcement thereof.<sup>21</sup> Where an ocean steamship ticket contained a provision that in no event should the steamship be liable for loss of baggage for an amount exceeding \$50, unless the value of the baggage in excess of that sum be declared at or before the issuance of the contract or at or before the delivery of the luggage to the ship, and freight at current rates for every kind of property is paid thereon, such

17. *Eggermont v. Cunard S. S. Co., Limited*, 119 N. Y. Supp. 1110 (N. Y. Mun. Ct.).

18. *The Morro Castle*, 168 Fed. 555. A provision printed in a steamship ticket for the carriage of six passengers, limiting the liability of the carrier for loss or damage to baggage to \$100, not read by nor called to the attention of the passengers, is unreasonable and void. *Weinberger v. Compagnie Generale Transatlantique*, 146 Fed. 516.

19. *Darnana v. La Compagnie Generale Transatlantique*, 114 N. Y. Supp. 118.

20. *Sterling Amusement Co. v. La Compagnie Generale Transatlantique*,

113 N. Y. Supp. 1032, 61 Misc. Rep. 603, judg. affd. on rehearing 113 N. Y. Supp. 1151.

**Hand baggage.**—Such a limitation provision does not apply to hand baggage delivered by a passenger to the company's baggage master. *Holmes v. North German Lloyd S. S. Co.*, 184 N. Y. 280, 77 N. E. 21, 5 L. R. A. (N. S.) 650, affg. judg. 90 N. Y. Supp. 834, 100 App. Div. 36.

21. *Tewes v. North German Lloyd S. S. Co.*, 186 N. Y. 151, 78 N. E. 864; 186 N. Y. 525, 78 N. E. 1113; *Brinck v. North German Lloyd S. S. Co.*, 186 N. Y. 525, 78 N. E. 1100, revg. judg. 93 N. Y. Supp. 1149, 104 App. Div. 619.



provision was effective to limit the carrier's liability in case of loss of baggage to the amount specified, though the loss was the result of the carrier's ordinary negligence.<sup>22</sup> Conditions printed inconspicuously on a steamship ticket, providing that the shipowner shall not be liable for any loss of the passenger's baggage through theft, or any act, neglect, or default of the shipownerservants or others, which were not known to the passenger nor called to his attention are invalid and constitute no defense to an action by the passenger to recover for the loss of jewelry stolen by one of the ship's employees.<sup>23</sup> A provision in a contract between a ship and its passengers that the landing shall not be deemed a

22. *Tewes v. North German Lloyd S. S. Co.*, *supra*; *Brinck v. Same*, *supra*.

23. *The Minnetonka*, 146 Fed. 509, 77 C. C. A. 217, *affg.* decree 132 Fed. 52.

Where a steamship passenger had not retired for the night, and a light was burning in her stateroom, she was not chargeable with contributory negligence for a theft therefrom because of leaving the door partially open for ventilation, and fastened only by a hook provided by the vessel for the purpose. *Id.*

A shipowner is liable to a passenger for the value of jewelry stolen during the voyage by a steward employed to perform duties which the carrier owed to the passenger under the contract of carriage. *Id.*

U. S. Rev. St., § 4281, providing that, if any shipper of jewelry, etc., contained in any parcel or package or trunk shall take the same as freight or baggage on any vessel without giving written notice of its character and value, and having the same en-

tered on the bill of lading, the shipowner shall not be liable as carrier. is intended to apply where such goods are received from a shipper by a carrier for transportation in the usual course of business, and does not relieve a shipowner from liability for jewelry worn and carried on board by a woman passenger with the intention of placing it in the custody of the purser, as permitted by the rules of the ship, but which was stolen by an employe of the ship before she had the opportunity to do so. *Id.*

Where a steamship was docked on completion of her voyage at 2 p. m., a notice of loss of effects by theft, mailed by a passenger at the same place at 5.30 p. m., on the second day thereafter, was a substantial compliance with a condition of the ticket requiring notice of claim to be given within 48 hours, especially where the facts of the loss were fully known to the officers of the vessel before the termination of the voyage. *Id.*

part of the voyage is contrary to public policy and void, and does not relieve the carrier from liability for loss of baggage or delay in its delivery.<sup>24</sup> A passenger on a steamship line running between ports of different nations is not restricted in his recovery to mere wearing apparel.<sup>25</sup>

24. *The Valencia*, 110 Fed. 221, affd. *Pacific Steam Whaling Co. v. Grismore*, 117 Fed. 68, 54 C. C. A. 454.

25. *Levensohn v. Cunard S. S. Co.*, 162 Ill. App. 421.

Manuscript of a manual on Greek grammar, which a steamship passenger had written and of which he had no copy, contained in a trunk, was

a proper part of his baggage, as affecting the steamship company's liability for loss of the trunk. *Wood v. Cunard S. S. Co.*, 192 Fed. 293, 112 C. C. A. 551, also holding evidence insufficient to show an agreement limiting the steamship company's liability to five pounds sterling.

APPENDIX  
THE ACT  
TO  
REGULATE COMMERCE  
(AS AMENDED)

ALSO

DISTRICT COURT JURISDICTION ACT  
IMMUNITY OF WITNESSES ACT  
ELKINS ACT  
EXPEDITING ACT  
GOVERNMENT-AIDED RAILROAD AND TELE  
GRAPH ACT  
SAFETY APPLIANCE ACTS  
ACCIDENT REPORTS ACT  
ARBITRATION ACT  
HOURS OF SERVICE ACT  
BOILER INSPECTION ACT  
ACT TO PUNISH LARCENY OF FREIGHT, ETC.  
LAKE ERIE AND OHIO RIVER SHIP CANAL ACT  
(Sec. 17)  
PARCEL POST ACT (Sec. 8)

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AS PUBLISHED BY THE INTERSTATE COMMERCE COMMISSION

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REVISED TO JANUARY 1, 1914



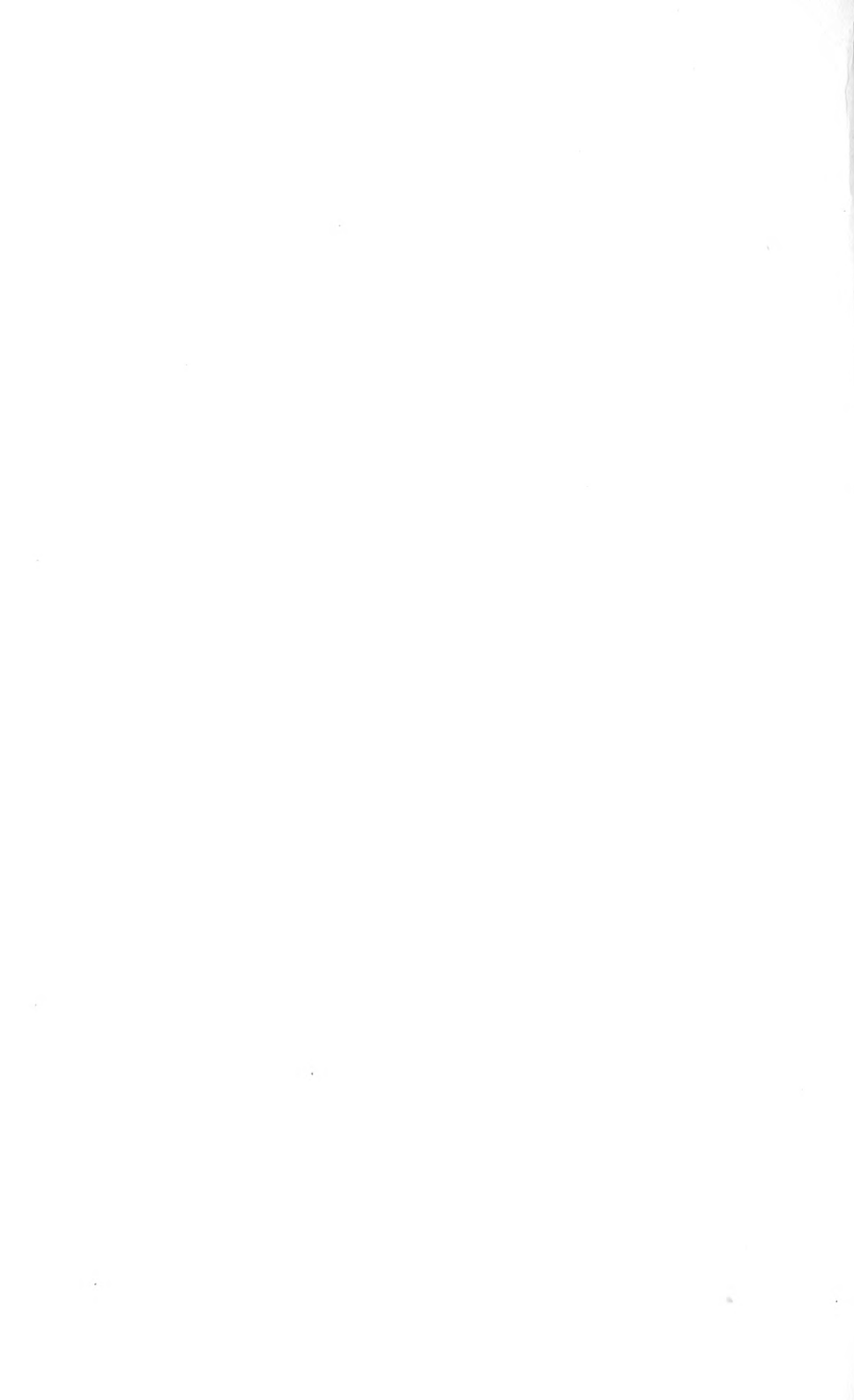
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## THE ACT TO REGULATE COMMERCE AS AMENDED.

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*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SEC. 1. (*As amended June 29, 1906, April 13, 1908, and June 18, 1910.*) That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States to any other State, Territory, or District of the United States or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from

Carriers and transportation subject to the act.

Telegraph, telephone, and cable companies.

Railroads and water lines.

Act does not  
apply to trans-  
portation  
wholly within  
one State.

a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this Act shall include express companies and sleeping car companies.

Express com-  
panies and  
sleeping car  
companies in-  
cluded.

What  
term "rail-  
road" in-  
cludes.

The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include

What  
term "trans-  
portation" in-  
cludes.

cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided*, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further*, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.

No common carrier subject to the provisions of this Act shall, after January 1st, nineteen hundred and seven, refuse to receive, transport, or deliver, or to refuse to

Charges must be just and reasonable.

Classifications, regulations, and practices must be just and reasonable.

Marking, packing, and delivery.

Free passage and free transportation prohibited.

excepted classes.

directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the re-

Interchange of passes authorized.

What terms "employees" and "families" include.

mains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof. (*See section 22.*)

Jurisdiction  
and penalty  
for violation.

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Commodities  
clause.

Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable

Carriers'  
duty to con-  
struct switch  
connections.

and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

Switch connections may be ordered by the Commission.

SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Unjust discrimination defined and forbidden.

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic.

Undue or unreasonable preference or advantage forbidden.

in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Facilities for  
interchange of  
traffic.

Discrim-  
ination be-  
tween connect-  
ing lines for-  
bidden.

SEC. 4. (*As amended June 18, 1910.*) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided, further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of

Long and  
short haul  
provision.

Commission  
has authority  
to relieve car-  
riers from the  
operation of  
this section.

six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Rates reduced to meet water competition not to be raised without permission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Pooling of freights and division earnings forbidden.

of and of for-

SEC. 5. (*As amended August 24, 1912.*) That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Amendment of August 24, 1912.

From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Railroads not to own competing water carriers.

Penalty.

Commission to determine as to competition.

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full



hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final. Orders to be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided*, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter. Commission's authority to allow owner ship of certain vessel lines by railroads.

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, Rates of such water carriers to be filed with Commission.

Violators of Sherman Act not to use canal.

chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Anti-trust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

SEC. 6. (*Amended March 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910, and August 24, 1912.*) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and the rates, fares, and charges for transportation between such points, including the charges for storage, and the charges for loading and unloading, and the charges for the use of the property.

Printing and  
posting of  
schedules of  
rates, fares  
and charges  
including  
rules and reg-  
ulations af-  
fecting the  
same, includ-  
ing storage, and

and shall contain the classification of freight in force, <sup>terminal charges, and freight classifications,</sup> and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production. <sup>Printing and posting of schedules of rates on freight carried through a foreign country.</sup>

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes <sup>Freight subject to customs duties in case of failure to publish through rates.</sup> <sup>Thirty days' public notice of change in rates must be given.</sup>

shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

Commission may modify requirements of this section.

Joint tariffs must specify names of carriers participating. Evidence of concurrence.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Copies of contracts, agreements or arrangements relating to traffic must be filed with Commission.

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

Commission may prescribe forms of schedules.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

No carrier shall engage in transportation unless it files and publishes rates, fares, and charges thereon.

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are

Published rates not to be deviated from.

specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier." "Carrier" means "common carrier."

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. Preference and expedition of military traffic in time of war.

The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful. Amendment of June 18, 1910. Commission may reject certain schedules.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Penalty for failure to comply with regulation.

If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in Carrier to furnish written statement of rate.

Penalty for misstatement of rate. consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Name of carrier's agent to be posted. It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: "The Station Agent of the ——— Company at ——— Station," together with the name of the proper post-office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post-office.

Amendment of August 24, 1912. When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the

Commission has jurisdiction over rail and water traffic in certain particulars. limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

Physical connection between rail lines and dock of water carriers. (a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection be-

tween its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

The Commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, and from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise for the handling of through business between interior points of the United States and such foreign country, the

Commission may determine terms and conditions of construction and operation.

Through routes and joint rates between rail and water carriers.

Proportional rates to and from ports.

Through routes and joint rates between rail and water carriers from a port in the United States to a foreign country via canal.

Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

Proceedings  
before the  
Commission to  
enforce these  
amendments.

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the Commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the Commission made under the provisions of section fifteen of the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

Carriage of  
freights must  
be treated as  
continuous un-  
less stoppage  
is in good  
faith.

SEC. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or



permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Liability of common carriers for damages caused by violation of this act.

SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages, the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Persons claiming to be damaged may elect whether to complain to the Commission or bring suit in a United States court.

Officers of defendant may be compelled to testify, but shall receive immunity.

SEC. 10. (*As amended March 2, 1889, and June 18, 1910.*) That any common carrier subject to the provisions of this Act, or, whenever such common carrier is

Penalties for violations of Act by carriers, or when the carrier is

a corporation, a corporation, any director or officer thereof, or any its officers, receiver, trustee, lessee, agent, or person acting for or agents, or employees: Fine and imprisonment.

employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Penalties for false billing, etc., by carriers, their officers or agents: Fine and imprisonment.

Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed,

be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person, corporation, or company, or any agent, or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction, within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five

Penalties for false billing, etc., by shippers and other persons: Fine and imprisonment.

thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: *Provided*, That the penalty of imprisonment shall not apply to artificial persons.

Penalties for inducing common carriers to discriminate unjustly: Fine and imprisonment. Joint liability with carrier for damages.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

Interstate Commerce Commission — how appointed.

SEC. 11. That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commis-

Terms of Commissioners

sioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission. (*See section 24, enlarging Commission and increasing salaries.*)

SEC. 12. (*As amended March 2, 1889, and February 10, 1891.*) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Power and duty of Commission to inquire into business of carriers and keep itself informed in regard thereto.

Commission required to execute and enforce provisions of this Act.

Duty of district attorneys to prosecute under direction of Attorney-General.

Costs and expenses of prosecution to be paid out of appropriation for courts.

Power of Commission to require attendance and testimony of witnesses and production of documentary evidence.

Commission may invoke aid of courts to compel witnesses to attend and testify.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

Penalty for disobedience to order of the court.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Claim that testimony or evidence will tend to criminate will not excuse witness.

Testimony may be taken by deposition.

The testimony of any witness may be taken, at the instance of a party in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party, or his attorney, proposing

Commission may order testimony to be taken by deposition.

Reasonable notice must be given.

to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Testimony by deposition may be compelled in the same manner as above specified.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

Manner of taking depositions.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

When witness is in a foreign country.

Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Depositions must be filed with the Commission.

Fees of witnesses and magistrates.

SEC. 13. (*As amended June 18, 1910.*) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If

Complaints to Commission. How and by whom made. How served upon carriers.

Reparation by carriers before investigation.

Investigations of complaints by the Commission.

Commission may issue orders in investigations begun on its own motion.

Complainant's interest immaterial.

Commission must make report of investigations, stating its conclusions and order.

Reparation.

such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matter complained of in such manner and by such means as it shall deem proper.

Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

SEC. 14. (*Amended March 2, 1889, and June 29, 1906.*) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.



All reports of investigations made by the Commission shall be entered of record and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

Reports of investigations must be entered of record. Service of copies on parties.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

Reports and decisions. Authorized publication competent evidence.

SEC. 15. (*As amended June 29, 1906, and June 18, 1910.*) That whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rates or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to

Publication and distribution of annual reports of Commission.

Commission may determine and prescribe just and reasonable rates and classifications to be observed as maximum charges.

Commission may determine and prescribe just and reasonable regulations or practices. Commission may order carriers to cease and desist from violations found. Orders of the Commission effective.

which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

Orders shall continue in force not exceeding two years, unless suspended or set aside by Commission or court.

When carriers fail to agree on divisions of joint rate, Commission may prescribe proportion of such rate to be received by each carrier.

Investigation of new schedules. Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty

Commission may suspend new schedules.

days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: *Provided*, That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Commission may extend suspension.

Burden of proof on carrier as to reasonableness of increased rates

The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare, or charge

Commission may establish through routes and joint rates and classifications.

when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

Limitation  
on power to  
prescribe  
through routes.

And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

Selection of  
route by ship-  
per.

In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constitut-

ing a portion of said through line or route his freight shall be transported.

It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: *Provided*, That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any State or federal court, or to any officer or agent of the government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Unlawful to give or receive information relative to rivals' shipments.

Exceptions.

Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars.

Penalty.

If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commis-

Commission may determine just and reasonable maximum charges for service rendered by owner of property

transported or for any instrumentality furnished by such owner and used in such transportation, may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

Enumeration of powers in this section not exclusive. The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.

Award of damages by Commission. SEC. 16. (*Amended March 2, 1889, June 29, 1906, and June 18, 1910.*) That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Petition to United States court in case carrier does not comply with order for payment of money. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in circuit court.

Petitioner not liable for costs in circuit court. Petitioner's attorney's fees. any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee,

to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or State court within one year from the date of the order, and not after.

Limitation upon action.

In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs against the defendant found to be liable to such plaintiff.

Joint plaintiffs may sue joint defendants in courts on awards of damages.

Service of process.

Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

Service of order of Commission.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Commission may suspend or modify order.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Carriers, their agents and employees, must comply with such orders.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct

Punishment by forfeiture for refusal to obey order of Commission under section 15.

violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

Forfeiture payable into Treasury and recoverable in civil suit.

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

Duty of district attorneys to prosecute.

It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The cost and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Costs and expenses to be paid out of appropriation for court expenses.

Commission may employ attorneys.

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for and represent the Commission in any case pending in the commerce court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

Petition to Commerce Court in cases of disobedience to order of Commission other than for payment of money.

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney-General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that Court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the Court shall enforce disobedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Commerce Court must enforce disobedient order if regularly made and duly served.

Rate schedules, contracts, or agreements.

The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agree-



ments, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals.

SEC. 16a. (*Added June 29, 1906.*) That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear.

Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

and carriers' annual reports filed with Commission of secretary are public records, receivable in courts and by the Commission as prima facie evidence. Certified copies or extracts therefrom also prima facie evidence.

Commission may grant rehearings.

Application for rehearing shall not operate as stay of proceedings, unless so ordered by Commission.

Commission may, on rehearing, reverse, change, or modify order.

SEC. 17. (*As amended March 2, 1889.*) That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

SEC. 18. (*As amended March 2, 1889.*) [*See Section 24, increasing salaries of Commissioners.*] That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars,<sup>1</sup> payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their or-

Interstate  
Commerce  
Commission.  
Form of pro-  
cedure.

Parties may  
appear before  
the Commis-  
sion in person  
or by attor-  
ney.

Official seal.

Salaries of  
Commissioners

Secretary —  
how appoint-  
ed; salary.

Employees.

Offices and  
supplies.

Witnesses'  
fees.

Expenses of  
the Commis-  
sion — how  
paid.

<sup>1</sup> Increased to \$5,000 by sundry civil act of March 4, 1907, 34 Stat. L., 1311.

ders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

SEC. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted, or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

Principal office of the Commission.  
Sessions of the Commission.  
Commission may prosecute inquiries by one or more of its members in any part of the United States.

SEC. 19a. That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

Amendment of March 1, 1913.  
Investigation by Commission.  
Experts.  
Classification and inventory.

First. In such investigation said Commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the

Cost of property used for common carrier purposes.

cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

Other property.

Value of real property.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

Property held for other than common carrier purposes.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Corporate organization.

Fourth. In ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also

Stocks and bonds.

Earnings and expenditures.

ascertain and report in such detail as may be determined by the Commission upon the expenditure of all moneys and the purposes for which the same were expended.

Fifth. The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

Such investigation shall be commenced within sixty days after the approval of this Act and shall be prosecuted with diligence and thoroughness, and the result

thereof reported to Congress at the beginning of each regular session thereafter until completed.

Documents to  
aid investiga-  
tion.

Every common carrier subject to the provisions of this Act shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determina-

Access of  
agents to prop-  
erty.

tion of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to co-operate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and di-

Effect of  
rules.

rect, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

Public inspection  
of records.

Valuation of  
extensions and  
improvements.

Upon the completion of the valuation herein provided for the Commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia.

Reports  
Congress.

to which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

To enable the Commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the Commission may require. Information required of carriers.

Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the Commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof. Notice of completion of tentative valuation. Finality if no protest filed.

If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. Hearings of protests. Changes. All final valuations by the Commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce." Effect of final valuation and classification.

and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

**Effect of evidence.**

If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings, in said

**Transmission to Commission.**

**Action of Commission.**

action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within

**Modification of order.**

the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first

**Judgment on original order.**

instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

**Applicable to receivers.**

The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the Commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

**Penalty.**



That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.

SEC. 20. (*As amended June 29, 1906, February 25, 1909, and June 18, 1910.*) That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act; to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also con-

Jurisdiction  
of district  
courts to com-  
pel compliance.

Carriers sub-  
ject to act, and  
owners of rail-  
roads engaged  
in interstate  
commerce  
must render  
full annual re-  
ports to Com-  
mission; and  
Commission  
is authorized  
to prescribe  
manner in  
which reports  
shall be made  
and require  
specific an-  
swers to all  
questions.  
What reports  
of carriers  
shall contain.

Commission may prescribe uniform system of accounts and manner of keeping accounts.

tain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Annual reports to be filed with Commission by September 30 of each year.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the Commission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in

Commission may grant additional time.

any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall

Penalty.

Monthly periodical reports, or re-

also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the

Commission, it shall be subject to the forfeitures last above provided.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act. Recovery of forfeitures.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken. Oath to annual reports, how taken.

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees. Commission may prescribe forms of accounts, records and memoranda, and have access thereto. Carrier cannot keep other accounts than those prescribed by Commission.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act. Punishment of carrier by forfeiture for failure to keep accounts or records as prescribed by Commission or allow inspection of accounts or records.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or Punishment of person for false entry in accounts or records, or mutilation of accounts or records, or for keeping other

accounts than those prescribed by Commission, Fine or imprisonment or both, memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

A m e n d m e n t  
o f F e b r u a r y  
25, 1909.

W h e n d e s t r u c t i o n o f  
p a p e r s p e r m i s s i b l e.

P u n i s h m e n t  
o f s p e c i a l e x a m i n e r w h o  
d i v u l g e s f a c t s  
o r i n f o r m a t i o n  
w i t h o u t a u t h o r i t y. F i n e  
o r i m p r i s o n m e n t o r b o t h.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

U n i t e d S t a t e s  
c o u r t s m a y i s s u e m a n d a m u s  
t o c o m p e l c o m p l i a n c e w i t h  
p r o v i s i o n s o f  
A c t.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

C o m m i s s i o n  
m a y e m p l o y  
s p e c i a l a g e n t s  
o r e x a m i n e r s  
t o a d m i n i s t e r  
o a t h s, e x a m i n e  
w i t n e s s e s, a n d  
r e c e i v e e v i d e n c e.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

Initial common carrier liable for loss or damage on through shipments carried by it or by any connection, irrespective of contract to contrary.

Remedies under existing law not barred

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

Initial carrier may have recourse upon carrier responsible for loss or damage.

SEC. 21. (*As amended March 2, 1889.*) That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

Annual reports of the Commission to Congress.

SEC. 22. (*As amended March 2, 1889, and February 8, 1895.*) [*See section 1, 5th par.*] That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal government, or for chari-

Persons and property that may be carried free or at reduced rates

Mileage, excursion, or commutation passenger tickets.

Passes and free transportation to officers and employees of railroad companies.

Provisions of Act are in addition to remedies existing at common law. Pending litigation not affected by Act.

Joint interchangeable five-thousand-mile tickets. Amount of free baggage.

Publication of rates.

table purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this Act: *Provided further*, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by

said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

SEC. 23. (*Added March 2, 1889.*) That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement.

Sale of tickets.

Penalties.

Jurisdiction of United States courts to issue writs of peremptory mandamus commanding the movement of interstate traffic or the furnishing of cars or other transportation facilities.

Peremptory mandamus may issue, notwithstanding proper compensation of carrier may be undetermined.

Remedy cumulative, and shall not interfere with other remedies provided by the Act.

Commission to consist of seven members; terms; salaries.

Qualifications and enlargement of Commission.

SEC. 24. (*Added June 29, 1906.*) That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Not more than four Commissioners shall be appointed from the same political party.

Existing laws as to attendance of witnesses and production of evidence applicable in proceedings under this Act.

(*Additional provisions in Act of June 29, 1906.*) (SEC. 9.) That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

Conflicting laws repealed.

(SEC. 10.) That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed; but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

When Act effective.

(SEC. 11.) That this Act shall take effect and be in force from and after its passage.

Time of taking effect extended 60 days (August 28, 1906)

Joint resolution of June 30, 1906, provides: "That the Act entitled 'An Act to amend an Act entitled "An Act to regulate commerce," approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the



powers of the Interstate Commerce Commission,' shall take effect and be in force sixty days after its approval by the President of the United States."

(*Additional provisions in Act June 18, 1910.*) (SEC. 6, PAR. 2.) It shall be the duty of every common carrier <sup>Carriers subject to interstate commerce in transportation of passengers or property for hire.</sup> subject to the provisions of this Act, within sixty days after the taking effect of this Act, to designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made for and on behalf of said common carrier in any proceeding or suit pending before the Interstate Commerce Commission or before said Commerce Court, and to file such designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and <sup>Service on such agents.</sup> processes may be made upon such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Interstate Commerce Commission or Commerce Court may be made by posting such notice or process in the office of the secretary of the Interstate Commerce Commission.

(SEC. 15.) That nothing in this Act contained shall <sup>Pending</sup> undo or impair any proceedings heretofore taken by or before the Interstate Commerce Commission or any of the Acts of said Commission; and in any cases, proceedings, or matters now pending before it, the Commission may exercise any of the powers hereby conferred upon it, as would be proper in cases, proceedings, or matters hereafter initiated; and nothing in this Act contained shall operate to release or affect any obligation, liability, penalty, or forfeiture heretofore existing against <sup>Existing liabilities.</sup> or incurred by any person, corporation, or association.

(SEC. 18.) That this act shall take effect and be in <sup>When act effective (August 17, 1910).</sup> force from and after the expiration of sixty days after its passage, except as to sections twelve and sixteen, which sections shall take effect and be in force immediately.

Public, No. 41, approved February 4, 1887, as amended by Public, No. 125, approved March 2, 1889, and Public, No. 72, approved February 10, 1891. Public, No. 38, approved February 8, 1895. Public, No. 337, approved June 29, 1906. Public Res., No. 47, approved June 30, 1906. Public, No. 95, approved April 13, 1908. Public, No. 262, approved February 25, 1909. Public, No. 218, approved June 18, 1910. Public, No. 337, approved August 24, 1912. Public, No. 400, approved March 1, 1913.

## DISTRICT COURT JURISDICTION ACT.

AN ACT making appropriations to supply urgent deficiencies in appropriations for the fiscal year nineteen hundred and thirteen, and for other purposes.

\* \* \* \* \*

The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignments, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the peti-

Commerce  
Court abol-  
ished.

Jurisdiction  
in district  
courts.

Tenure of of-  
fice.

Venue of  
suits on orders  
of Interstate  
Commerce  
Commission.

tioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

**Principal office.** The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court.

**Procedure in district courts.** No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at

**Interlocutory injunction.** least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the

**Notice.** Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges

**Temporary stay.**

pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State. All cases pending in the Commerce Court at the date of the passage of this Act shall be deemed pending in and be transferred forthwith to said district courts except cases which may previously have been submitted to that court for final decree and the latter to be transferred to the district courts if not decided by the Commerce Court before December first, nineteen hundred and thirteen, and all cases wherein injunctions or other orders or decrees, mandatory or otherwise, have been directed or entered prior to the abolition of the said court shall be transferred forthwith to said district

irreparable  
damage.

Hearing.

Appeal.

Final judgment.

Cases pending.

transference  
to district  
courts.

courts, which shall have jurisdiction to proceed therewith and to enforce said injunctions, orders, or decrees. Each of said cases and all the records, papers, and proceedings shall be transferred to the district court wherein it might have been filed at the time it was filed in the Commerce Court if this Act had then been in effect; and if it might have been filed in any one of two or more district courts it shall be transferred to that one of said district courts which may be designated by the petitioner or petitioners in said case, or, upon failure of said petitioners to act in the premises within thirty days after the passage of this Act, to such one of said district courts as may be designated by the judges of the Commerce Court. The judges of the Commerce Court shall have authority, and are hereby directed, to make any and all orders and to take any other action necessary to transfer as aforesaid the cases and all the records, papers, and proceedings then pending in the Commerce Court to said district courts. All administrative books, dockets, files, and all papers of the Commerce Court not transferred as part of the record of any particular case shall be lodged in the Department of Justice. All furniture, carpets, and other property of the Commerce Court is turned over to the Department of Justice and the Attorney General is authorized to supply such portion thereof as in his judgment may be proper and necessary to the United States Board of Mediation and Conciliation.

Supreme  
Court to re-  
mand.

Any case hereafter remanded from the Supreme Court which, but for the passage of this Act, would have been remanded to the Commerce Court, shall be remanded to a district court, designated by the Supreme Court, wherein it might have been instituted at the time it was instituted in the Commerce Court if this Act had then been in effect, and thereafter such district court shall take all necessary and proper proceedings in such case in accordance with law and such mandate, order, or decree therein as may be made by said Supreme Court.

Repeal.

All laws or parts of laws inconsistent with the foregoing provisions relating to the Commerce Court, are repealed.

\* \* \* \* \*

Public, No. 32, approved October 22, 1913.

## IMMUNITY OF WITNESSES ACT.

AN ACT In relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and amendments thereto.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.

Public, No. 54, approved February 11, 1893.

Attendance and testimony of witnesses and production of documentary evidence before the Commission, and in any case, criminal or otherwise, in the courts.

Immunity to testifying witnesses.

Perjury excepted.

Penalties: Fine or imprisonment, or both.

## IMMUNITY ACT.

AN ACT Defining the right of immunity of witnesses under the Act entitled "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, and an Act entitled "An Act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and an Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That under the immunity provisions in the Act entitled "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the Act entitled "An Act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and in the Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

Immunity extends only to natural persons who give testimony under subpoena.

Public, No. 389, approved June 30, 1906.



## ELKINS ACT.

AN ACT To further regulate commerce with foreign nations and among the States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, SEC. 1. (As amended June 29, 1906.) That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall,

Carrier corporation as well as officer or agent liable to conviction for misdemeanor.

Penalty.

Failure of carrier to publish rates or observe tariffs a misdemeanor.

Penalty, fine.

Misdemeanor to offer, grant, give, solicit, accept, or receive any rebate from published rates or other concession or discrimination.

knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Penalty, fine  
or imprisonment,  
or both.

Judicial district  
in which  
cases may be  
prosecuted.

Act of officer  
or agent to be  
also deemed  
act of carrier.

Rates filed or  
participated in  
by carrier  
shall, as  
against such  
carrier, be  
deemed legal  
rate.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

Any person, corporation, or company who shall de-

liver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

SEC. 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and in-

Forfeiture, in addition to other prescribed penalties, of three times amount of money and value of consideration illegally received shall be paid to the United States. Attorney-General to collect such forfeiture by civil action.

Period covered to be six years prior to commencement of action.

Persons interested in matters involved increase before Interstate Commerce Commission or circuit court may be made parties and shall be subject to orders or decrees.

quiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Proceedings  
to enjoin or  
restrain depart-  
ures from  
published rates  
or any dis-  
crimination  
prohibited by  
law against  
carriers and  
parties inter-  
ested in traf-  
fic.

SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of ap-  
peal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce" and the Acts amendatory thereof. And in

Such pro-  
ceedings shall  
not prevent  
actions for re-  
covery of dam-  
ages or other  
action author-  
ized by Act to  
regulate com-  
merce or  
amendments  
thereof.

proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in such proceeding: *Provided*, That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.

Compulsory attendance and testimony of witnesses of production of books and papers.

Immunity to testifying witnesses.

Expediting Act of Feb. 11, 1903, to apply in cases prosecuted under direction of Attorney-General in name of Interstate Commerce Commission.

SEC. 4. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, but such repeal shall not affect causes now pending, nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.

Conflicting laws repealed.

SEC. 5. That this Act shall take effect from its passage.

Public, No. 103, approved February 19, 1903.

(See additional provisions in Act of June 29, 1906, p. 2096 herein.)

**EXPEDITING ACT.**

AN ACT To expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted.

Expedition of  
cases.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Sec. 1. (As amended June 25, 1910.)* That

in any suit in equity pending or hereafter brought in any circuit court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said court, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select, or, in case the full court shall not at any time be made up by reason of the necessary absence or disqualification of one or more of the said circuit judges, the justice of the Supreme Court assigned to that circuit or the other circuit judge or judges may designate a district judge or judges within the circuit who shall be competent to sit in said court at the hearing of said suit. In the event

Hearing be-  
fore three  
judges.

the judges sitting in such case shall be equally divided in opinion as to the decision or disposition of said cause, or in the event that a majority of said judges shall be unable to agree upon the judgment, order, or decree finally disposing of said case in said court which should be entered in said cause, then they shall immediately certify that fact to the Chief Justice of the United States, who shall at once designate and appoint some circuit judge to sit with said judges and to assist in determining said cause. Such order of the Chief Justice shall be immediately transmitted to the clerk of the circuit court in which said cause is pending, and shall be entered upon the minutes of said court. Thereupon said cause shall at once be set down for reargument and the parties thereto notified in writing by the clerk of said court of the action of the court and the date fixed for the reargument thereof. The provisions of this section shall apply to all causes and proceedings in all courts now pending, or which may hereafter be brought.

SEC. 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law.

Public, No. 82, approved February 11, 1903; Public, No. 310, approved June 25, 1910.

Chief Justice  
to designate  
circuit judge  
in case of  
equal division.

Reargument.

Appeal to Su-  
preme Court.

Exception.

**GOVERNMENT-AIDED RAILROAD ACT.**

AN ACT Supplementary to the Act of July first, eighteen hundred and sixty-two, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and also of the Act of July second, eighteen hundred and sixty-four, and other Acts amendatory of said first-named Act.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which, by the Acts incorporating them, or by any Act amendatory or supplementary thereto, are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward, by and through their own respective corporate officers and employees, maintain and operate, for railroad, governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the Acts making the grants as aforesaid.

Government  
aided railroad  
and telegraph  
lines must  
themselves  
maintain and  
operate.

Connecting  
telegraph  
lines.

SEC. 2. That whenever any telegraph company which shall have accepted the provisions of title sixty-five of the Revised Statutes shall extend its line to any station or office of a telegraph line belonging to any one of said railroad or telegraph companies, referred to in the first section of this Act, said telegraph company so extending its line shall have the right and said railroad or telegraph company shall allow the line of said telegraph company so extending its line to connect with the telegraph line of said railroad or telegraph company to which it is extended at the place where their lines may meet, for the prompt and convenient interchange of telegraph business between said companies; and such railroad and telegraph companies, referred to in the first



section of this Act, shall so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever, and shall receive, deliver, and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable.

Equal facilities required.

SEC. 3. That if any such railroad or telegraph company referred to in the first section of this Act or company operating such railroad or telegraph line shall refuse or fail, in whole or in part, to maintain, and operate a telegraph line as provided in this Act and Acts to which this is supplementary, for the use of the Government or the public, for commercial and other purposes, without discrimination, or shall refuse or fail to make or continue such arrangements for the interchange of business with any connecting telegraph company, then any person, company, corporation, or connecting telegraph company may apply for relief to the Interstate Commerce Commission, whose duty it shall thereupon be, under such rules and regulations as said Commission may prescribe, to ascertain the facts, and determine and order what arrangement is proper to be made in the particular case, and the railroad or telegraph company concerned shall abide by and perform such order; and it shall be the duty of the Interstate Commerce Commission, when such determination and order are made, to notify the parties concerned, and, if necessary, enforce the same by writ of mandamus in the courts of the United States, in the name of the United States, at the relation of either of said Interstate Commerce Commissioners: *Provided*, That the said Commissioners may institute any inquiry, upon their own motion, in the same manner and to the same effect as though complaint had been made.

Complaints to Interstate Commerce Commission.

Duties of the Commission where complaint is made.

Commission may institute inquiries on its own motion.

SEC. 4. That in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph com-

Duty of the Attorney-General under this Act.

panies referred to in the first section of this Act, and to have the same possessed, used, and operated in conformity with the provisions of this Act and of the several Acts to which this Act is supplementary, it is hereby made the duty of the Attorney-General of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this Act, and under the Acts heretofore mentioned, and under all Acts of Congress relating to such railroads and telegraph lines, and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation.

Penalties for failure to comply with the provision of this Act or the orders of the Interstate Commerce Commission.

SEC. 5. That any officer or agent of said railroad or telegraph companies, or of any company operating the railroads and telegraph lines of said companies, who shall refuse or fail to operate the telegraph lines of said railroad or telegraph companies under his control, or which he is engaged in operating, in the manner directed in this Act and by the Acts to which it is supplementary, or who shall refuse or fail, in such operation and use, to afford and secure to the Government and the public equal facilities, or to secure to each of said connecting telegraph lines equal advantages and facilities in the interchange of business, as herein provided for, without any discrimination whatever, for or adverse to the telegraph line of any or either of said connecting companies, or shall refuse to abide by, or perform and carry out within a reasonable time the order or orders of the Interstate Commerce Commission, shall in every such case of refusal or failure be guilty of a misdemeanor, and, on conviction thereof, shall in every such case be fined in a sum not exceeding one thousand dollars, and may be imprisoned not less than six

months; and in every such case of refusal or failure the party aggrieved may not only cause the officer or agent guilty thereof to be prosecuted under the provisions of this section, but may also bring an action for the damages sustained thereby against the company whose officer or agent may be guilty thereof, in the circuit or district court of the United States in any State or Territory in which any portion of the road or telegraph line of said company may be situated; and in case of suit process may be served upon any agent of the company found in such State or Territory, and such service shall be held by the court good and sufficient.

SEC. 6. That it shall be the duty of each and every one of the aforesaid railroad and telegraph companies, within sixty days from and after the passage of this Act, to file with the Interstate Commerce Commission copies of all contracts and agreements of every description existing between it and every other person or corporation whatsoever in reference to the ownership, possession, maintenance, control, use, or operation of any telegraph lines, or property over or upon its rights of way, and also a report describing with sufficient certainty the telegraph lines and property belonging to it, and the manner in which the same are being then used and operated by it, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of such claim, and the manner in which the same are being then used and operated; and it shall be the duty of each and every one of said railroad and telegraph companies annually hereafter to report to the Interstate Commerce Commission, with reasonable fullness and certainty, the nature, extent, value, and condition of the telegraph lines and property then belonging to it, the gross earnings, and all expenses of maintenance, use, and operation thereof, and its relation and business with all connecting telegraph companies during the preceding year, at such time and in such manner as may be required by a system of reports which said Commission shall prescribe; and if any of said railroad or telegraph companies shall refuse or fail to make such

Actions for damages may also be brought

Duty of railroad and telegraph lines subject to this Act to file copies of contracts and a report with the Commission.

Annual reports to the Commission.

Penalties for refusal to make reports to Commission.

reports or any report as may be called for by said Commission, or refuse to submit its books and records for inspection, such neglect or refusal shall operate as a forfeiture, in each case of such neglect or refusal, of a sum not less than one thousand dollars nor more than five thousand dollars, to be recovered by the Attorney-General of the United States, in the name and for the use and benefit of the United States; and it shall be the duty of the Interstate Commerce Commission to inform the Attorney-General of all such cases of neglect or refusal, whose duty it shall be to proceed at once to judicially enforce the forfeitures hereinbefore provided.

Duty of Attorney-General to prosecute.

Right of Congress to alter, amend, or repeal.

Equity rights of the Government preserved.

SEC. 7. That nothing in this Act shall be construed to affect or impair the right of Congress, at any time hereafter, to alter, amend, or repeal the said acts hereinbefore mentioned; and this Act shall be subject to alteration, amendment, or repeal as, in the opinion of Congress, justice or the public welfare may require; and nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in the United States, or any authority that the Postmaster-General now has under title sixty-five of the Revised Statutes to fix rates, or, of the Government, to purchase lines as provided under said title, or to have its messages given precedence in transmission.

Public, No. 237, approved August 7, 1888.

## THE SAFETY APPLIANCE ACTS.

AN ACT To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That from and after the first day of January, <sup>Driving wheel and train brakes.</sup> eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, <sup>Automatic couplers.</sup> eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this Act, <sup>When carriers may lawfully refuse to receive cars from connecting lines or shippers.</sup> it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this Act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this Act.

SEC. 4. That from and after the first day of July, <sup>Grabirons and handholds</sup> eighteen hundred and ninety-five, until otherwise or-

dered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

**S t a n d a r d**  
height of draw-  
bars for freight  
cars,

SEC. 5. That within ninety days from the passage of this Act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as foresaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

**Penalty for**  
violation of the  
provisions of  
this act.

SEC. 6. (*As amended April 1, 1896.*) That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation

**D u t y** of  
United States  
district attorney.

shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation hav-

ing occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Duty of Interstate Commerce Commission.

Exceptions of the act.

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this Act.

Power of Interstate Commerce Commission to extend time of carriers to comply with this act.

SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this Act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Employees not deemed to assume risk of employment.

Public, No. 113, approved March 2, 1893, amended April 1, 1896.

Note.—Prescribed standard height of drawbars: Standard-gauge roads, 34½ inches; narrow-gauge roads, 26 inches; maximum variation between loaded and empty cars, 3 inches.

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AN ACT To amend an Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions and requirements of the

Safety a p- Act entitled "An Act to promote the safety of employees  
pliance act of and travelers upon railroads by compelling common car-  
Mar. 2, 1893, riers engaged in interstate commerce to equip their cars  
as amended by with automatic couplers and continuous brakes, and  
act of Apr. 1, 1896, shall ap- their locomotives with driving-wheel brakes, and for  
ply in Terri- other purposes," approved March second, eighteen hun-  
tories and Dis- dred and ninety-three, and amended April first, eighteen  
trict of Colum- hundred and ninety-six, shall be held to apply to com-  
bia. mon carriers by railroads in the Territories and the Dis-

Provisions of safety appli- coudlers shall  
ance acts as to hundred and ninety-six, shall be held to apply to com-  
couplers shall apply in all  
apply in all cases when  
cases when couplers are  
couplers are brought to-  
brought to- trict of Columbia and shall apply in all cases, whether  
gether. or not the couplers brought together are of the same

Safety appli- kind, make, or type; and the provisions and require-  
ance acts shall apply to ments hereof and of said Acts relating to train brakes,  
shall apply to all equipment automatic couplers, grab irons, and the height of draw-  
of any railroad bars shall be held to apply to all trains, locomotives,  
engaged in in- tenders, cars, and similar vehicles used on any railroad  
terstate com- engaged in interstate commerce, and in the Territories  
merce, and the District of Columbia, and to all other locomo-  
tives, tenders, cars, and similar vehicles in connection

Exceptions. therewith, excepting those trains, cars, and locomotives  
engaged in interstate commerce, and in the Territories  
and the District of Columbia, and to all other locomo-  
tives, tenders, cars, and similar vehicles in connection  
therewith, excepting those trains, cars, and locomotives  
exempted by the provisions of section six of said Act of  
March second, eighteen hundred and ninety-three, as  
amended by the Act of April first, eighteen hundred and  
ninety-six, or which are used upon street railways.

Power or SEC. 2. That whenever, as provided in said Act, any  
train brakes on train is operated with power or train brakes, not less  
not less than than fifty per centum of the cars in such train shall have  
50 per cent of their brakes used and operated by the engineer of the  
cars in trains locomotive drawing such train; and all power-braked  
shall be used cars in such train which are associated together with  
and operated. said fifty per centum shall have their brakes so used and  
operated; and, to more fully carry into effect the ob-

C o m m i s s i o n j e c t s of said Act, the Interstate Commerce Commission  
may increase may, from time to time, after full hearing, increase the  
minimum per- minimum percentage of cars in any train required to  
centage of be operated with power or train brakes which must have  
power or train their brakes used and operated as aforesaid; and failure  
brake cars to to comply with any such requirement of the said Inter-  
be used. state Commerce Commission shall be subject to the like

Penalty.

penalty as failure to comply with any requirement of  
this section.



SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall except as specifically amended by this Act, apply to this Act.

Act effective  
Sept. 1, 1903.

Provisions,  
powers, duties,  
requirements,  
and liabilities,  
specified in act  
of Mar. 2, 1893,  
and act of Apr.  
1, 1896, apply  
to this act.

Public, No. 133, approved March 2, 1903.

AN ACT To supplement "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes," and other safety appliance Acts, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

To what carriers  
applicable.

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and

When act effective.

Cars to be  
equipped with  
sill steps, hand  
brakes, ladders,  
running  
boards, and  
grab irons.

all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

Commission  
to designate  
number, dimensions,  
location, and  
manner of application  
of appliances.

SEC. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this Act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown: and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: *Provided*, That the Inter-

Period of  
compliance  
may be extended.

state Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said

Commission  
may modify  
height of draw-  
bars.

Commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory.

Present  
standard  
height of draw-  
bars legal.

and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission.

SEC. 4. That any common carrier subject to this Act <sup>Penalty for violation of provisions of this Act.</sup> using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this Act not equipped as provided in this Act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: *Provided*, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such <sup>Defective cars may be hauled to nearest available repair point.</sup> car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this <sup>Carriers not relieved from liability for death or injury.</sup> section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains <sup>Hauling by chains.</sup> instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

SEC. 5. That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this <sup>Carriers not relieved from penalty, except for causes above named.</sup>

Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this Act.

**Enforcement.** SEC. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this Act.

**Extension of effective date of supplementary Act.** That the jurisdiction of the Interstate Commerce Commission to extend the period within which any common carrier shall comply with the provisions of section three of the Act entitled, "An Act to supplement 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' and other safety-appliance acts, and for other purposes," approved April fourteenth, nineteen hundred and ten, shall apply to cars actually placed in service between the date of the passage of said Act, and the first day of July, nineteen hundred and eleven, in the same manner and to the same extent that it applies to cars actually in service upon the date of the passage of said Act. [36 Stat. L., 1397.]

Public, No. 133, approved April 14, 1910; Public, No. 525, approved March 4, 1911.

**Employment of inspectors.**

Sundry civil act (appropriations) of June 28, 1920, authorizes Commission to employ "inspectors to execute and enforce the requirements of the safety-appliance act."

## BLOCK SIGNAL RESOLUTION.

JOINT RESOLUTION Directing the Interstate Commerce Commission to investigate and report on block-signal systems and appliances for the automatic control of railway trains.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Interstate Commerce Commission be, and it is hereby, directed to investigate and report on the use of and necessity for block-signal systems and appliances for the automatic control of railway trains in the United States. For this purpose the Commission is authorized to employ persons who are familiar with the subject, and may use such of its own employees as are necessary to make a thorough examination into the matter.

Commission directed to investigate and report on necessity for block signals.

In transmitting its report to the Congress the Commission shall recommend such legislation as to the Commission seems advisable.

Commission to take testimony and make recommendations.

To carry out and give effect to the provisions of this resolution the Commission shall have power to issue subpoenas, administer oaths, examine witnesses, require the production of books and papers, and receive depositions taken before any proper officer in any State or Territory of the United States.

Public Resolution, No. 46, approved June 30, 1906.

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AN ACT To grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes.

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SEC. 18. That when in any case two or more railroads crossing each other at a common grade shall, by a system of interlocking or automatic signals, or by any works or fixtures to be erected by them, render it safe for engines and trains to pass over such crossing without stopping, and such interlocking or automatic signals or

works or fixtures shall be approved by the Interstate Commerce Commissioners, then, in that case, it is hereby made lawful for the engines and trains of such railroad or railroads to pass over such crossing without stopping, any law or the provisions of any law to the contrary notwithstanding; and when two or more railroads cross each other at a common grade, either of such roads may apply to the Interstate Commerce Commissioners for permission to introduce upon both of said railroads some system of interlocking or automatic signals or works or fixtures rendering it safe for engines and trains to pass over such crossings without stopping, and it shall be the duty of said Interstate Commerce Commissioners, if the system of works and fixtures which it is proposed to erect by said company are, in the opinion of the Commission, sufficient and proper, to grant such permission.

SEC. 19. That any railroad company which has obtained permission to introduce a system of interlocking or automatic signals at its crossing at a common grade with any other railroad, as provided in the last section, may, after thirty days' notice, in writing, to such other railroad company, introduce and erect such interlocking or automatic signal or fixtures; and if such railroad company, after such notification, refuses to join with the railroad company giving notice in the construction of such works or fixtures, it shall be lawful for said company to enter upon the right of way and tracks of such second company, in such manner as to not unnecessarily impede the operation of such road, and erect such works and fixtures, and may recover in any action at law from such second company one-half of the total cost of erecting and maintaining such interlocking or automatic signals or works or fixtures on both of said roads.

\* \* \* \* \*

Public. No. 26, approved February 28, 1902.

**ACCIDENT REPORTS ACT.**

**AN ACT** Requiring common carriers engaged in interstate and foreign commerce to make full reports of all accidents to the Interstate Commerce Commission, and authorizing investigations thereof by said Commission.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate or foreign commerce by railroad to make to the Interstate Commerce Commission, at its office in Washington, District of Columbia, a monthly report, under oath, of all collisions, derailments, or other accidents resulting in injury to persons, equipment, or roadbed arising from the operation of such railroad under such rules and regulations as may be prescribed by the said Commission, which report shall state the nature and causes thereof and the circumstances connected therewith: *Provided*, That hereafter all said carriers shall be relieved from the duty of reporting accidents in their annual financial and operating reports made to the Commission.

Monthly reports of railway accidents.

SEC. 2. That any common carrier failing to make such report within thirty days after the end of any month shall be deemed guilty of a misdemeanor, and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not more than one hundred dollars for each and every offense and for every day during which it shall fail to make such report after the time herein specified for making the same.

Failure to make report within thirty days after end of any month a misdemeanor.

Penalty.

SEC. 3. That the Interstate Commerce Commission shall have authority to investigate all collisions, derailments, or other accidents resulting in serious injury to person or to the property of a railroad occurring on the line of any common carrier engaged in interstate or foreign commerce by railroad. The Commission, or any impartial investigator thereunto authorized by said Commission, shall have authority to investigate such collisions, derailments, or other accidents aforesaid, and all

Power of the Commission to investigate accidents.

Taking of  
testimony.

State Com-  
missions.

Reports of in-  
vestigations.

Reports not  
to be used in  
evidence  
against car-  
rier.

Form of re-  
port.

Repeal of  
prior Act.

"Interstate  
commerce"  
and "foreign  
commerce"  
defined.

When Act ef-  
fective.

the attending facts, conditions, and circumstances, and for that purpose may subpoena witnesses, administer oaths, take testimony, and require the production of books, papers, orders, memoranda, exhibits, and other evidence, and shall be provided by said carriers with all reasonable facilities: *Provided*, That when such accident is investigated by a commission of the State in which it occurred, the Interstate Commerce Commission shall, if convenient, make any investigation it may have previously determined upon, at the same time as, and in connection with, the state commission investigation. Said Commission shall, when it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper.

SEC. 4. That neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

SEC. 5. That the Interstate Commerce Commission is authorized to prescribe for such common carriers a method and form for making the reports hereinbefore provided.

SEC. 6. That the Act entitled "An Act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission," approved March third, nineteen hundred and one, is hereby repealed.

SEC. 7. That the term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, and the term "foreign commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the District of Columbia.

SEC. 8. That this Act shall take effect sixty days after its passage.

Public, No. 165, approved May 6, 1910.



## COAL AND OIL RESOLUTIONS.

JOINT RESOLUTION Instructing the Interstate Commerce Commission to make examinations into the subject of railroad discriminations and monopolies in coal and oil, and report on the same from time to time.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* <sup>Commission instructed to</sup> That the Interstate Commerce Commission be, and is <sup>examine into</sup> hereby, authorized and instructed immediately to in- <sup>subject of rail-</sup>quire, investigate, and report to Congress, or to the <sup>road discrimi-</sup>President when Congress is not in session, from time to <sup>nations in coal</sup>time as the investigation proceeds— <sup>and oil, and</sup> <sup>make report</sup> <sup>from time to</sup> <sup>time,</sup>

First. Whether any common carriers by railroad, subject to the interstate commerce act, or either of them, own or have any interest in, by means of stock ownership in other corporations or otherwise, any of the coal or oil which they, or either of them, directly or through other companies which they control or in which they have an interest, carry over their or any of their lines as common carriers, or in any manner own, control, or have any interest in coal lands or properties or oil lands or properties.

Second. Whether the officers of any of the carrier <sup>Interest of</sup> companies aforesaid, or any of them, or any person or <sup>carriers in coal</sup> persons charged with the duty of distributing cars or <sup>and oil lands</sup> furnishing facilities to shippers, are interested, either <sup>or coal and oil</sup> directly or indirectly, by means of stock ownership or <sup>traffic,</sup> otherwise, in corporations or companies owning, operating, leasing, or otherwise interested in any coal mines, <sup>Interest of</sup> coal properties, or coal traffic, oil, oil properties, or oil <sup>railroad officials in coal</sup> traffic over the railroads with which they or any of them <sup>and oil lands</sup> are connected or by which they or any of them are em- <sup>or coal and oil</sup>ployed. <sup>traffic,</sup>

Third. Whether there is any contract, combination in <sup>Combination</sup> the form of trust, or otherwise, or conspiracy in re- <sup>or trust in</sup>straint of trade or commerce among the several States, <sup>restraint of</sup> in which any common carrier engaged in the transporta- <sup>trade, or mo-</sup>tion of coal or oil is interested, or to which it is a party; <sup>nopoly in coal</sup> and whether any such common carrier monopolizes or <sup>or oil traffic.</sup>

attempts to monopolize, or combines or conspires with any other carrier, company or companies, person or persons to monopolize any part of the trade or commerce in coal or oil, or traffic therein among the several States or with foreign nations, and whether or not, and if so, to what extent, such carriers, or any of them, limit or control, directly or indirectly, the output of coal mines or the price of coal and oil fields or the price of oil.

Commission  
to make re-  
port.

Fourth. If the Interstate Commerce Commission shall find that the facts or any of them set forth in the three paragraphs above do exist, then that it be further required to report as to the effect of such relationship, ownership, or interest in coal or coal properties and coal traffic, or oil, oil properties, or oil traffic aforesaid, or such contracts or combinations in form of trust or otherwise, or conspiracy or such monopoly or attempt to monopolize or combine or conspire as aforesaid, upon such person or persons as may be engaged independently of any other persons in mining coal or producing oil and shipping the same, or other products, who may desire to so engage, or upon the general public as consumers of such coal or oil.

System of  
car supply and  
distribution.

Fifth. That said Commission be also required to investigate and report the system of car supply and distribution in effect upon the several railway lines engaged in the transportation of coal or oil as aforesaid, and whether said systems are fair and equitable, and whether the same are carried out fairly and properly: and whether said carriers, or any of them, discriminate against shippers or parties wishing to become shippers over their several lines, either in the matter of distribution of cars or in furnishing facilities or instrumentalities connected with receiving, forwarding, or carrying coal or oil as aforesaid.

Commission  
to suggest  
remedy and re-  
port facts and  
conclusions.

Sixth. That said Commission be also required to report as to what remedy it can suggest to cure the evils above set forth, if they exist.

Seventh. That said Commission be also required to report any facts or conclusions which it may think pertinent to the general inquiry above set forth.

Information  
to be furnish-  
ed from time  
to time.

Eighth. That said Commission be required to make this investigation at its earliest possible convenience

and to furnish the information above required from time to time and as soon as it can be done consistent with the performance of its public duty.

Public Resolution, No. 8, approved March 7, 1906.

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JOINT RESOLUTION Amending joint resolution instructing the Interstate Commerce Commission to make examinations into the subject of railroad discriminations and monopolies, and report on the same from time to time, approved March seventh, nineteen hundred and six.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That joint resolution instructing the Interstate Commerce Commission to make examinations into the subject of railroad discriminations and monopolies, and report on the same from time to time, approved March seventh, nineteen hundred and six, is hereby amended by adding the following thereto:

Ninth. To enable the Commission to perform the duties required and accomplish the purposes declared herein, the Commission shall have and exercise under this joint resolution the same power and authority to administer oaths, to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence, and to obtain full information, which said Commission now has under the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and Acts amendatory thereof or supplementary thereto now in force or may have under any like statute taking effect hereafter. All the requirements, obligations, liabilities, and immunities imposed or conferred by said Act to regulate commerce and by "An Act in relation to testimony before the Interstate Commerce Commission in cases under or connected with an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and amendments thereto," approved February eleventh, eighteen hundred and ninety-three, shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority herein conferred.

Commission given full power to compel testimony in coal and oil investigations.

Public Resolution, No. 11, approved March 21, 1906.

## ARBITRATION ACT.

AN ACT Concerning carriers engaged in interstate commerce and their employees.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this Act shall apply to any common carrier or carriers and their officers, agents, and employees, except masters of vessels and seamen, as defined in section forty-six hundred and twelve, Revised Statutes of the United States, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States.

Adjustment of controversies between railroads and their employees.  
Scope of Act.

Terms.  
—"railroad."

The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

—"transportation."

—"employees."

The term "employees" as used in this Act shall include all persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract: *Provided, however,* That this Act shall not be held to apply to employees of street railroads and shall apply only to employees engaged in railroad train service. In every such case the carrier shall be responsible for the acts and defaults of such employees in the same manner and to the same extent as if said cars were owned by it and said employees di-

Street railroads excepted.

rectly employed by it, and any provisions to the contrary of any such lease or other contract shall be binding only as between the parties thereto and shall not affect the obligations of said carrier either to the public or to the private parties concerned.

SEC. 2. That whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between a carrier subject to this Act and the employees of such carrier, seriously interrupting or threatening to interrupt the business of said carrier, the chairman of the Interstate Commerce Commission and the Commissioner of Labor shall, upon the request of either party to the controversy, with all practicable expedition, put themselves in communication with the parties to such controversy, and shall use their best efforts, by mediation and conciliation, to amicably settle the same; and if such efforts shall be unsuccessful, shall at once endeavor to bring about an arbitration of said controversy in accordance with the provisions of this Act.

SEC. 3. That whenever a controversy shall arise between a carrier subject to this Act and the employees of such carrier which cannot be settled by mediation and conciliation in the manner provided in the preceding section, said controversy may be submitted to the arbitration of a board of three persons, who shall be chosen in the manner following: One shall be named by the carrier or employer directly interested; the other shall be named by the labor organization to which the employees directly interested belong, or, if they belong to more than one, by that one of them which specially represents employees of the same grade and class and engaged in services of the same nature as said employees so directly interested: *Provided, however,* That when a controversy involves and affects the interests of two or more classes and grades of employees belonging to different labor organizations, such arbitrator shall be agreed upon and designated by the concurrent action of all such labor organizations; and in cases where the majority of such employees are not members of any labor organization, said employees may by a majority vote select a committee of their own number, which committee shall have

Responsibility  
of carrier on  
leased cars.

Chairman of  
Interstate  
Commerce  
Commission  
and Commis-  
sioner of La-  
bor to mediate  
differences.

Failure to ad-  
just.

Board to ar-  
bitrate. How  
selected.

Controversies  
affecting dif-  
ferent labor or-  
ganizations.

- the right to select the arbitrator on behalf of said employees. The two thus chosen shall select the third Commissioner of arbitration; but, in the event of their failure to name such arbitrator within five days after their first meeting, the third arbitrator shall be named by the Commissioners named in the preceding section. A majority of said arbitrators shall be competent to make a valid and binding award under the provisions hereof.
- Third arbitrator.** The submission shall be in writing, shall be signed by the employer and by the labor organization representing the employees, shall specify the time and place of meeting of said board of arbitration, shall state the questions to be decided, and shall contain appropriate provisions by which the respective parties shall stipulate as follows:
- Form of submission.** First. That the board of arbitration shall commence their hearings within ten days from the date of the appointment of the third arbitrator, and shall find and file their award, as provided in this section, within thirty days from the date of the appointment of the third arbitrator; and that pending the arbitration the status existing immediately prior to the dispute shall not be changed: *Provided*, That no employee shall be compelled to render personal service without his consent.
- Stipulations of submission.** Second. That the award and the papers and proceedings, including the testimony relating thereto certified under the hands of the arbitrators and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the circuit court of the United States for the district wherein the controversy arises or the arbitration is entered into and shall be final and conclusive upon both parties, unless set aside for error of law apparent on the record.
- Time of hearings.** Third. That the respective parties to the award will each faithfully execute the same, and that the same may be specifically enforced in equity so far as the powers of a court of equity permit: *Provided*, That no injunction or other legal process shall be issued which shall compel the performance by any laborer against his will of a contract for personal labor or service.
- Status of controversy pending arbitration.** Fourth. That employees dissatisfied with the award shall not by reason of such dissatisfaction quit the ser-
- Involuntary service.**
- Enforcing award.**
- Filing of award in the United States circuit court.**
- Involuntary service.**
- Notice of termination of service.**

vice of the employer before the expiration of three months from and after the making of such award without giving thirty days' notice in writing of their intention so to quit. Nor shall the employer dissatisfied with such award dismiss any employee or employees on account of such dissatisfaction before the expiration of three months from and after the making of such award without giving thirty days' notice in writing of his intention so to discharge.

Fifth. That said award shall continue in force as between the parties thereto for the period of one year after <sup>Continuance in force of</sup> award, the same shall go into practical operation, and no new arbitration upon the same subject between the same employer and the same class of employees shall be had until the expiration of said one year if the award is not set aside as provided in section four. That as to individual employees not belonging to the labor organization or organizations which shall enter into the arbitration, <sup>Individual employees not parties not bound by</sup> the said arbitration and the award made therein shall not be binding, unless the said individual employees shall give assent in writing to become parties to said arbitration.

SEC. 4. That the award being filed in the clerk's office of a circuit court of the United States, as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent upon the record, in which case said award shall go into practical operation and judgment be entered accordingly when such exceptions shall have been finally disposed of either by said circuit court or on appeal therefrom. <sup>Exceptions to award.</sup>

At the expiration of ten days from the decision of the circuit court upon exceptions taken to said award, <sup>Appeal to circuit court of</sup> as appeals, aforesaid, judgment shall be entered in accordance with said decision unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided. <sup>Record.</sup>

**Judgment.** The determination of said circuit court of appeals upon said questions shall be final, and being certified by the clerk thereof to said circuit court, judgment pursuant thereto shall thereupon be entered by said circuit court.

**Judgment by agreement.** If exceptions to an award are finally sustained, judgment shall be entered setting aside the award. But in such case the parties may agree upon a judgment to be entered disposing of the subject-matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

**Powers of arbitration.** SEC. 5. That for the purposes of this Act the arbitrators herein provided for, or either of them, shall have power to administer oaths and affirmations, sign subpoenas, require the attendance and testimony of witnesses, and the production of such books, papers, contracts, agreements, and documents material to a just determination of the matters under investigation as may be ordered by the court; and may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements and documents to the same extent and under the same conditions and penalties as is provided for in the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and the amendments thereto.

**Agreement to arbitrate.** SEC. 6. That every agreement of arbitration under this Act shall be acknowledged by the parties before a notary public or clerk of a district or circuit court of the United States, and when so acknowledged a copy of the same shall be transmitted to the chairman of the Interstate Commerce Commission, who shall file the same in the office of said Commission.

**Filing of agreement in office of Interstate Commerce Commission.** Any agreement of arbitration which shall be entered into conforming to this Act, except that it shall be executed by employees individually instead of by a labor organization as their representative, shall, when duly acknowledged as herein provided, be transmitted to the chairman of the Interstate Commerce Commission, who shall cause a notice in writing to be served upon the arbitrators, fixing a time and place for a meeting of said board, which shall be within fifteen days from the execution of said agreement of arbitration: *Provided, how-*

**Agreement of individual employees to arbitrate.**

**Meeting to be called.**



ever, That the said chairman of the Interstate Commerce Commission shall decline to call a meeting of arbitrators under such agreement unless it be shown to his satisfaction that the employees signing the submission represent or include a majority of all employees in the service of the same employer and of the same grade and class, and that an award pursuant to said submission can justly be regarded as binding upon all such employees.

Condition.

SEC. 7. That during the pendency of arbitration under this Act it shall not be lawful for the employer, party to such arbitration, to discharge the employees, parties thereto, except for inefficiency, violation of law, or neglect of duty; nor for the organization representing such employees to order, nor for the employees to unite in, aid, or abet, strikes against said employer; nor, during a period of three months after an award under such an arbitration, for such employer to discharge any such employees, except for the causes aforesaid, without giving thirty days' written notice of an intent so to discharge; nor for any of such employees, during a like period, to quit the service of said employer without just cause, without giving to said employer thirty days' written notice of an intent so to do; nor for such organization representing such employees to order, counsel, or advise otherwise. Any violation of this section shall subject the offending party to liability for damages: *Provided*, That nothing herein contained shall be construed to prevent any employer, party to such arbitration, from reducing the number of its or his employees whenever in its or his judgment business necessities require such reduction.

Restrictions on parties during pendency of arbitration.

After award.

Penalty.

Reduction of force for business reasons.

SEC. 8. That in every incorporation under the provisions of chapter five hundred and sixty-seven of the United States Statutes of eighteen hundred and eighty-five and eighteen hundred and eighty-six it must be provided in the articles of incorporation and in the constitution, rules, and by-laws that a member shall cease to be such by participating in or by instigating force or violence against persons or property during strikes, lock-outs, or boycotts, or by seeking to prevent others from working through violence, threats, or intimidations. Members of such incorporations shall not be personally

National trade unions.

Forfeiture of membership for violence.

**Liabilities.**

Appearance  
of corporations  
in arbitration  
proceedings.

liable for the acts, debts, or obligations of the corporations, nor shall such corporations be liable for the acts of members or others in violation of law; and such corporations may appear by designated representatives before the board created by this Act, or in any suits or proceedings for or against such corporations or their members in any of the federal courts.

Railroads in  
hands of fed-  
eral receiver.  
Employees to  
be heard.

SEC. 9. That whenever receivers appointed by federal courts are in the possession and control of railroads, the employees upon such railroads shall have the right to be heard in such courts upon all questions affecting the terms and conditions of their employment, through the officers and representatives of their associations, whether incorporated or unincorporated, and no reduction of wages shall be made by such receivers without the authority of the court therefor upon notice to such employees, said notice to be not less than twenty days before the hearing upon the receivers' petition or application, and to be posted upon all customary bulletin boards along or upon the railway operated by such receiver or receivers.

Notice of  
reduction of  
wages.

Prohibition of  
unjust re-  
quirements as  
conditions to  
employment.

SEC. 10. That any employer subject to the provisions of this Act and any officer, agent, or receiver of such employer who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization; or who shall require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or

Attempts to  
prevent fur-  
ther employ-  
ment after dis-  
charge.

conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars. Penalty.

SEC. 11. That each member of said board of arbitration shall receive a compensation of ten dollars per day for the time he is actually employed, and his traveling and other necessary expenses; and a sum of money sufficient to pay the same, together with the traveling and other necessary and proper expenses of any conciliation or arbitration had hereunder, not to exceed ten thousand dollars in any one year, to be approved by the chairman of the Interstate Commerce Commission and audited by the proper accounting officers of the Treasury, is hereby appropriated for the fiscal years ending June thirtieth, eighteen hundred and ninety-eight, and June thirtieth, eighteen hundred and ninety-nine, out of any money in the Treasury not otherwise appropriated. Appropriation for expenses of arbitration.

SEC. 12. That the Act to create boards of arbitration or commission for settling controversies and differences between railroad corporations and other common carriers engaged in interstate or territorial transportation of property or persons and their employees, approved October first, eighteen hundred and eighty-eight, is hereby repealed. Repeal.

The President of the United States from and after the passage of this Act is authorized to designate from time to time any member of the Interstate Commerce Commission or of the Court of Commerce to exercise the powers conferred and the duties imposed upon the chairman of the Interstate Commerce Commission by the provisions of the "Act concerning carriers engaged in interstate commerce and their employees," approved June first, eighteen hundred and ninety-eight; and the member so designated, during the period for which he is designated, shall have the powers now conferred by said Act on the chairman of the Interstate Commerce Commission. [36 Stat. L., 1397.] Member of Commerce Court may act.

Public. No. 115, approved June 1, 1898; Public. No. 525, approved March 4, 1911.

## MEDAL OF HONOR ACT.

AN ACT To promote the security of travel upon railroads engaged in interstate commerce, and to encourage the saving of life.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President of the United States be, and he is hereby, authorized to cause to be prepared bronze medals of honor, with suitable emblematic devices, which shall be bestowed upon any persons who shall hereafter, by extreme daring, endanger their own lives in saving, or endeavoring to save, lives from any wreck, disaster, or grave accident, or in preventing or endeavoring to prevent such wreck, disaster, or grave accident, upon any railroad within the United States engaged in interstate commerce: *Provided*, That no award of said medal shall be made to any person until sufficient evidence of his deserving shall have been furnished and placed on file, under such regulations as may be prescribed by the President of the United States.

SEC. 2. That the President of the United States be, and he is hereby, authorized to issue to any person to whom a medal of honor may be awarded under the provisions of this Act a rosette or knot, to be worn in lieu of the medal, and a ribbon to be worn with the medal; said rosette or knot and ribbon to be each of a pattern to be prescribed by the President of the United States: *Provided*, That whenever a ribbon issued under the provisions of this Act shall have been lost, destroyed, or rendered unfit for use without fault or neglect on the part of the person to whom it was issued, a new ribbon shall be issued to such person without charge therefor.

SEC. 3. That the appropriations for the enforcement and execution of the provisions of the Acts to promote the safety of employees and travelers upon railroads are hereby made available for carrying out the provisions of this Act.

Public, No. 98, approved February 23, 1905.

**REGULATIONS UNDER MEDALS ACT.**

**REGULATIONS** Governing the award of life-saving medals under the foregoing Act. Made by the President of the United States on March 29, 1905.

1. Applications for medals under this Act should be addressed to and filed with the Interstate Commerce Commission, at the city of Washington, D. C. Satisfactory evidence of the facts upon which the application is based must be filed in each case. This evidence should be in the form of affidavits made by eyewitnesses, of good repute and standing, testifying of their own knowledge. The opinion of witnesses that the person for whom an award is sought acted with extreme daring and endangered his life is not sufficient, but the affidavits must set forth the facts in detail and show clearly in what manner and to what extent life was endangered and extreme daring exhibited. The railroad upon which the incident occurred, the date, time of day, condition of the weather, the names of all persons present when practicable, and other pertinent circumstances should be stated. The affidavits should be made before an officer duly authorized to administer oaths and be accompanied by the certificate of some United States official of the district in which the affiants reside, such as a judge or clerk of United States court, district attorney, or postmaster, to the effect that the affiants are reputable and credible persons. If the affidavits are taken before an officer without an official seal his official character must be certified by the proper officer of a court of record under the seal thereof.

Applications for medals, how made.

Contents of affidavits.

2. Applications for medals, together with all affidavits and other evidence received in connection therewith, shall be referred to a committee of five persons, consisting of the secretary of the Commission, the chief inspector of safety appliances, two inspectors of safety appliances designated by the Commission, and the clerk of the safety appliance examining board, who shall act as clerk of the committee. This committee shall carefully consider each application presented and, after

Committee to consider applications.

thoroughly weighing the evidence, shall prepare an abstract or brief covering the case and file the same, together with the committee's recommendation, with the Commission, which brief and recommendation shall be transmitted by the Commission to the President for his approval. The committee may, with the approval of the Commission, direct any inspector of safety appliances in the employ of the Commission to proceed to the locality where the service was performed for which a medal is claimed, and make a personal investigation and report upon the facts of the case, which report shall be filed and made a part of the evidence considered by the committee.

Brief of committee.

Personal investigations.

President's approval of recommendation.

3. Upon final approval of the committee's recommendation by the President the Commission shall take such measures to carry the recommendation into effect as the President may direct.

Designs for medals.

4. The Commission shall cause designs to be prepared for the medal, rosette, and ribbon provided for by the Act, which designs shall be submitted to the President for his approval.

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AN ACT To incorporate the Lake Erie and Ohio River Ship Canal, to define the powers thereof, and to facilitate interstate commerce.

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SEC. 17. That the said canals shall be open to the use and navigation of all suitable and proper vessels or other water craft, by whomsoever owned or operated, upon fair and equal terms, conditions, rates, tolls, and charges; and the said company may demand, take, and recover for its own proper use, for all persons and things of whatsoever description transported upon the said canals, feeders, and others works, or in vessels and craft using the same, just and reasonable charges, rates, and tolls; but all such charges, rates, and tolls shall be equal to all persons, vessels, and goods under certain classifications to be established by the company and approved by the Interstate Commerce Commission; and no re-

Charges shall be reasonable.

bate, reduction, drawback, or discrimination of any sort <sup>Charges to be approved by Commission.</sup> on such charges, rates, and tolls shall ever be made directly or indirectly. And the said charges, rates, and tolls for the ensuing year shall be fixed, published, and <sup>P u b l i c a t i o n of schedules.</sup> posted on or in every place where they are to be collected, on or before the fifteenth day of February of each year, and shall not be changed except after thirty days' public notice, which notice shall plainly state the changes proposed to be made in the charges, rates, and tolls then in force and the time when the changed charges, rates, and tolls will go into effect; and the proposed changes shall be shown by printing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Interstate Commerce Commission may, <sup>C o m m i s s i o n m a y m o d i f y requirements.</sup> in its discretion and for good cause shown, allow changes upon less notice than herein specified or modify the foregoing requirements in respect to publishing and posting of such schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

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Public, No. 402, approved June 30, 1906.

## HOURS OF SERVICE ACT.

**AN ACT** To promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this Act shall apply to

Common carrier and employees subject to Act.

any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States.

Meaning of term "railroad."

The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

Meaning of term "employees."

Sixteen hours the maximum continuous service of trainmen.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty:

Ten consecutive hours off duty.



*Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to

Service hours  
of telegraph  
and telephone  
operators.

Commission  
may extend  
period.

Penalty for  
violation.

Prosecutions.

Unavoidable  
accidents, etc.

the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

Wrecking,  
etc., crews.

Enforcement. SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.

Effective. SEC. 5. That this Act shall take effect and be in force one year after its passage.

Public, No. 274, approved March 4, 1907, 11.50 a. m.

## ASH PAN ACT.

AN ACT To promote the safety of employees on railroads.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That on and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

Ash-pan  
equipment in  
interstate  
commerce.

SEC. 2. That on and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier by railroad in any Territory of the United States or the District of Columbia to use any locomotive not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

Ash-pan  
equipment in  
Territories and  
District of Co-  
lumbia.

SEC. 3. That any such common carrier using any locomotive in violation of any of the provisions of this Act shall be liable to a penalty of two hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed: and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge.

Penalties.

Enforcement.

Commission  
to lodge infor-  
mation.

SEC. 4. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this Act.

Powers grant-  
ed to Commis-  
sion.

Receivers included.

SEC. 5. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

When ash pan is not necessary.

SEC. 6. That nothing in this Act contained shall apply to any locomotive upon which, by reason of the use of oil, electricity, or other such agency, an ash pan is not necessary.

Public, No. 165, approved May 30, 1908.

## TRANSPORTATION OF EXPLOSIVES ACT.

**AN ACT** To promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its violation.

By an Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March 4, 1909, to take effect and be in force on and after the first day of January, 1910, the Act entitled "An Act to promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its violation," approved May 30, 1908, is repealed, and the following sections of said Act to codify, revise, and amend the penal laws of the United States are substituted therefor:

SEC. 232. It shall be unlawful to transport, carry, or convey, any dynamite, gunpowder, or other explosive, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, and a place in any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier, which vessel or vehicle is carrying passengers for hire: *Provided*, That it shall be lawful to transport on any such vessel or vehicle small arms ammunition in any quantity, and such fuses, torpedoes, rockets, or other signal devices, as may be essential to promote safety in operation, and property packed and marked samples of explosives for laboratory examination, not exceeding a net weight of one-half pound each, and not exceeding twenty samples at one time in a single vessel or vehicle; but such samples shall not be carried in that part of a vessel or vehicle which is intended for the transportation of passengers for hire: *Provided further*, That nothing in this section shall be construed to prevent the transportation of military or naval forces with their accompanying munitions of war on passenger equipment vessels or vehicles.

*Dynamite, etc., not to be carried on passenger vehicles for hire.*

**Interstate Commerce Commission to make regulations for transportation of explosives.** SEC. 233. The Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. Said commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions. Such regulations shall be in accord with the best known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport. Such regulations, as well as all changes or modifications thereof, shall take effect ninety days after their formulation and publication by said commission and shall be in effect until reversed, set aside, or modified.

**Liquid nitroglycerin, etc., not to be carried on certain vehicles.** SEC. 234. It shall be unlawful to transport, carry, or convey, liquid nitroglycerin, fulminate in bulk in dry condition, or other like explosive, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between place in one State, Territory, or District of the United States, or a place noncontiguous to but subject to the jurisdiction thereof, and a place in any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier in the transportation of passengers or articles of commerce by land or water.

**Marking of packages of explosives; deceptive marking.** SEC. 235. Every package containing explosives or other dangerous articles when presented to a common carrier for shipment shall have plainly marked on the outside thereof the contents thereof; and it shall be unlawful for any person to deliver, or cause to be delivered, to any common carrier engaged in interstate or foreign commerce by land or water, for interstate or foreign transportation, or to carry upon any vessel or vehicle engaged in interstate or foreign transportation, any explosive, or other dangerous article, under any

false or deceptive marking, description, invoice, shipping order, or other declaration, or without informing the agent of such carrier of the true character thereof, at or before the time such delivery or carriage is made. Whoever shall knowingly violate, or cause to be violated, any provision of this section, or of the three sections last preceding, or any regulation made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than two thousand dollars, or imprisoned not more than eighteen months, or both.

SEC. 236. When the death or bodily injury of any person is caused by the explosion of any article named in the four sections last preceding, while the same is being placed upon any vessel or vehicle to be transported in violation thereof, or while the same is being so transported, or while the same is being removed from such vessel or vehicle, the person knowingly placing, or aiding or permitting the placing, of such articles upon any such vessel or vehicle, to be so transported, shall be imprisoned not more than ten years.

Death or  
bodily injury  
caused by such  
transportation.

Public, No. 350, approved March 4, 1909; effective January 1, 1910.

## STREET RAILWAYS ACT.

AN ACT Authorizing certain extensions to be made of the lines of the Anacostia and Potomac River Railroad Company, the Washington Railway and Electric Company, the City and Suburban Railway of Washington, and the Capital Traction Company, in the District of Columbia, and for other purposes.

\* \* \* \* \*

Metropolitan  
Coach Com-  
pany.

Transfers  
with Washing-  
ton Railway  
and Electric  
Company to  
continue.

Substitution  
of motor vehi-  
cles required.

Proviso.  
Transfers.

SEC. 12. That existing transfer arrangements between the Washington Railway and Electric Company and the Metropolitan Coach Company, a corporation of the District of Columbia, shall not be terminated, except by authority of Congress; and unless said Metropolitan Coach Company shall, within one year after the passage of this Act, substitute motor vehicles to be approved by the Commissioners of the District of Columbia, for the herxies now used by it, its right to operate its line shall cease and determine: *Provided further*, That all transfers issued by the Metropolitan Coach Company shall be properly dated and punched as to time limit as provided by rules and regulations to be made, altered, and amended from time to time by the Interstate Commerce Commission, and that unless said transfers are so dated and punched the Washington Railway and Electric Company shall not be required to receive them.

\* \* \* \* \*

Clean, safe  
cars, not  
crowded.

Commission  
to enforce  
obedience.

SEC. 16. That every street railroad company or corporation owning, controlling, leasing or operating one or more street railroads within the District of Columbia shall on each and all of its railroads supply and operate a sufficient number of cars, clean, sanitary, in good repair, with proper and safe power, equipment, appliances and service, comfortable and convenient and so operate the same as to give expeditious passage, not to exceed fifteen miles per hour within the city limits or twenty miles per hour in the suburbs, to all persons desirous of the use of said cars, without crowding said cars. The Interstate Commerce Commission is hereby given power to require and compel obedience to all of the provisions



of this section, and to make, alter, amend, and enforce all needful rules and regulations to secure said obedience; and said Commission is given power to make all such orders and regulations necessary to the exercise of the powers herein granted to it as may be reasonable and proper; and such railroad companies or corporations, their officers and employees, are hereby required to obey all the provisions of this section, and such regulations and orders as may be made by said Commission. Any such company or corporation, or its officers or employees, violating any provision of this section, or any of the said orders or regulations made by said Commission, or permitting such violation, shall be punished by a fine of not more than one thousand dollars. And each day of failure or neglect on the part of such company or corporation, its officers or employees, to obey each and all of the provisions and requirements of this section, or the orders and regulations of the Commission made thereunder, shall be regarded as a separate offense.

Commission  
may make or-  
ders.

Carriers must  
comply.

Penalties.

Separate of-  
fenses.

SEC. 17. That prosecutions for violations of any of the provisions of this Act shall be on information of the Interstate Commerce Commission filed in the police court by or on behalf of the Commission.

Prosecutions.

\* \* \* \* \*

Public, No. 134, approved May 23, 1908.

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AN ACT Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and ten, and for other purposes.

\* \* \* \* \*

On and after the passage of this Act every corporation engaged in the manufacture and sale of gas or electricity in the District of Columbia shall open and keep a set of books in manner and form prescribed by the Interstate Commerce Commission.

Commission  
to prescribe  
form of book-  
keeping for  
District of Co-  
lumbia gas and  
electric com-  
panies.

\* \* \* \* \*

Public, No. 303, approved March 3, 1909.

### BOILER INSPECTION ACT.

AN ACT To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this Act shall apply to

Locomotive  
boilers.  
Common car-  
riers affected  
by act.

any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad as used in this Act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

Meaning of  
terms.  
"Railroads."

"Employees."

Locomotives.  
Use, unless  
with safe boil-  
ers, unlawful.

SEC. 2. That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Inspection.

SEC. 3. That there shall be appointed by the President, by and with the advice and consent of the Senate, a chief inspector and two assistant chief inspectors of locomotive boilers, who shall have general superintendence of the inspectors hereinafter provided for, direct them in the duties hereby imposed upon them, and see that the requirements of this Act and the rules, regulations, and instructions made or given hereunder are observed by common carriers subject hereto. The said chief inspector and his two assistants shall be selected with reference to their practical knowledge of the construction and repairing of boilers, and to their fitness and ability to systematize and carry into effect the provisions hereof relating to the inspection and maintenance of locomotive boilers. The chief inspector shall receive a salary of four thousand dollars per year and the assistant chief inspectors shall each receive a salary of three thousand dollars per year; and each of the three shall be paid his traveling expenses incurred in the performance of his duties. The office of the chief inspector shall be in Washington, District of Columbia, and the Interstate Commerce Commission shall provide such stenographic and clerical help as the business of the offices of the chief inspector and his said assistants may require.

Chief and  
two assistant  
chief inspectors.  
Appoint-  
ment, etc.  
Post, p. 1397.

Selection.

Salaries, etc.

Office, etc.

SEC. 4. That immediately after his appointment and qualification the chief inspector shall divide the territory comprising the several States, the Territories of New Mexico and Arizona, and the District of Columbia into fifty locomotive boiler-inspection districts, so arranged that the service of the inspector appointed for each district shall be most effective, and so that the work required of each inspector shall be substantially the same. Thereupon there shall be appointed by the Interstate Commerce Commission fifty inspectors of locomotive boilers. Said inspectors shall be in the classified service and shall be appointed after competitive examination according to the law and the rules of the Civil Service Commission governing the classified service. The chief inspector shall assign one inspector so appointed to each of the districts hereinbefore named. Each inspector

Inspection  
districts.

District in-  
spectors.

In classified  
civil service.

Salaries, etc. shall receive a salary of one thousand eight hundred dollars per year and his traveling expenses while engaged in the performance of his duty. He shall receive in addition thereto an annual allowance for office rent, stationery, and clerical assistance, to be fixed by the Interstate Commerce Commission, but not to exceed in the case of any district inspector six hundred dollars per year. In order to obtain the most competent inspectors possible, it shall be the duty of the chief inspector to prepare a list of questions to be propounded to applicants with respect to construction, repair, operation, testing, and inspection of locomotive boilers, and their practical experience in such work, which list, being approved by the Interstate Commerce Commission, shall be used by the Civil Service Commission as a part of its examination. No person interested, either directly or indirectly, in any patented article required to be used on any locomotive under supervision or who is intemperate in his habits shall be eligible to hold the office of either chief inspector or assistant or district inspector.

Examinations  
of applicants.

Disqualifica-  
tions.

Inspection by  
carriers.

Approval,  
etc., of rules  
filed.

Provisos.  
Rules to be  
observed if  
carrier fails  
carrier fails to  
file any.

Changes.

SEC. 5. That each carrier subject to this Act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this Act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the Commission requires, shall become obligatory upon such carrier: *Provided, however,* That if any carrier subject to this Act shall fail to file its rules and instructions the chief inspector shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, being approved by the Interstate Commerce Commission, and a copy thereof being served upon the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: *Provided also,* That such common carrier may from time to time change the rules and regulations herein provided for, but such change shall not take effect and the new rules and regulations be in force until the same shall have been filed

with and approved by the Interstate Commerce Commission. The chief inspector shall also make all needful rules, regulations, and instructions not inconsistent herewith for the conduct of his office and for the government of the district inspectors: *Provided, however,* That all such rules and instructions shall be approved by the Interstate Commerce Commission before they take effect.

Office rules,  
etc.

Approval of  
all rules.

District in-  
spection.

Personal in-  
spection of  
boilers.

Inspection by  
carriers.

S w o r n re-  
ports to be  
filed.

Repairing de-  
fects.

Notice of de-  
fective boilers,  
etc.

Proviso.

SEC. 6. That it shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the chief inspector or an assistant shall make such division between inspectors as will avoid the necessity for duplication of work. Each inspector shall make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to fully carry out the provisions of this Act, and as may be consistent with his other duties, but he shall not be required to make such inspections at stated times or at regular intervals. His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service. To this end each carrier subject to this Act shall file with the inspector in charge, under the oath of the proper officer or employee, a duplicate of the report of each inspection required by such rules and regulations, and shall also file with such inspector, under the oath of the proper officer or employee, a report showing the repair of the defects disclosed by the inspection. The rules and regulations hereinbefore provided for shall prescribe the time at which such reports shall be made. Whenever any district inspector shall, in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto not conforming to the requirements of the law or the rules and regulations established and approved as hereinbefore stated, he shall notify the carrier in writing that the locomotive is not in serviceable condition, and thereafter such boiler shall not be used until in serviceable condition: *Provided,*

- Appeals to chief inspector by carrier.** That a carrier, when notified by an inspector in writing that a locomotive boiler is not in serviceable condition, because of defects set out and described in said notice, may within five days after receiving said notice, appeal to the chief inspector by telegraph or by letter to have
- Re-examination.** said boiler re-examined, and upon receipt of the appeal from the inspector's decision, the chief inspector shall assign one of the assistant chief inspectors or any district inspector other than the one from whose decision the appeal is taken to re-examine and inspect said boiler
- Effect.** within fifteen days from date of notice. If upon such re-examination the boiler is found in serviceable condition, the chief inspector shall immediately notify the carrier in writing, whereupon such boiler may be put into service without further delay; but if the re-examination of said boiler sustains the decision of the district inspector, the chief inspector shall at once notify the carrier owning or operating such locomotive that the appeal from the decision of the inspector is dismissed, and upon the receipt of such notice the carrier may, within thirty days, appeal to the Interstate Commerce Commission. and upon such appeal, and after hearing, said Commission shall have power to revise, modify, or
- Final action.** set aside such action of the chief inspector and declare that said locomotive is in serviceable condition and authorize the same to be operated: *Provided further,* That
- Inspector's requirements effective pending appeals.** pending either appeal the requirements of the inspector shall be effective.
- Annual report of chief inspector.** SEC. 7. That the chief inspector shall make an annual report to the Interstate Commerce Commission of the work done during the year, and shall make such recommendations for the betterment of the service as he may desire.
- Accidents from failure of boilers.** SEC. 8. That in the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the chief inspector.
- Investigation.** Whereupon the facts concerning such accident shall be investigated by the chief inspector or one of his assistants, or such inspector as the chief inspector may designate.

nate for that purpose. And where the locomotive is disabled to the extent that it cannot be run by its own steam, the part or parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The chief inspector or an assistant or the designated inspector making the investigation shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the chief inspector.

The Interstate Commerce Commission may at any time call upon the chief inspector for a report of any accident embraced in this section, and upon the receipt of said report, if it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper. Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

SEC. 9. That any common carrier violating this Act or any rule or regulation made under its provisions or any lawful order of any inspector shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed: and it shall be the duty of such attorney, subject to the direction of the Attorney-General, to bring such suits upon duly verified information being lodged with them, respectively, of such violations having occurred: and it shall be the duty of the chief inspector of locomotive boilers to give information to the proper United States attorney of all violations of this Act coming to his knowledge.

SEC. 10. That the total amounts directly appropriated to carry out the provisions of this Act shall not exceed for any one fiscal year the sum of three hundred thousand dollars.

Public, No. 383, approved February 7, 1911.

**ACT TO PUNISH LARCENY OF FREIGHT, ETC.**

**AN ACT** To punish the unlawful breaking of seals of railroad cars containing interstate or foreign shipments, the unlawful entering of such cars, the stealing of freight and express packages or baggage or articles in process of transportation in interstate shipment, and the felonious asportation of such freight or express packages or baggage or articles therefrom into another district of the United States, and the felonious possession or reception of the same.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent, in either case, to commit larceny therein; or whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as, or which are a part of or which constitute, an interstate or foreign shipment of freight or express, or shall buy, or receive, or have in his possession any such goods or chattels, knowing the same to have been stolen; or whoever shall steal or shall unlawfully take, carry away, or by fraud or deception obtain, with intent to convert to his own use, any baggage which shall have come into the possession of any common carrier for transportation from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia, or to a foreign country, or from a foreign country to any State or Territory or the District of Columbia, or shall break into, steal, take, carry away, or conceal any of the contents of such baggage, or shall buy, receive, or have in his possession any such baggage or any article therefrom of whatsoever nature, knowing the same to have been stolen, shall in each case be fined not more than five thousand dollars or imprisoned not more than ten years, or both, and prosecutions therefor may be instituted in any district wherein the crime shall have been committed. The carrying or transporting of any such freight, express, baggage, goods, or chattels from one State or Territory or the District of Columbia into another State or Territory or the District of Columbia, knowing the same to have been stolen, shall



constitute a separate offense and subject the offender to the penalties above described for unlawful taking, and prosecutions therefor may be instituted in any district into which such freight, express, baggage, goods, or chattels shall have been removed or into which they shall have been brought by such offender.

Sec. 2. That nothing in this Act shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

Public, No. 377, approved February 13, 1913.

## THE HARTER ACT.

**AN ACT** relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

**SEC. 2.** That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened or avoided.

**SEC. 3.** That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel,

her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

SEC. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

Present liabilities not affected.

R. S., Secs. 4281 - 4283, pp. 826, 827.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

Live animals. SEC. 7. Sections one and four of this act shall not apply to the transportation of live animals.

In effect July 1, 1893.

SEC. 8. That this act shall take effect from and after the first day of July, eighteen hundred and ninety-three.

Approved February 13, 1893.

PARCEL POST.

AN ACT making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes.

Sec. 8. (Parcel Post.)

\* \* \* \* \*

The classification of articles mailable as well as the weight limit, the rates of postage, zone or zones and other conditions of mailability under this Act, if the Postmaster General shall find on experience that they or any of them are such as to prevent the shipment of articles desirable, or to permanently render the cost of the service greater than the receipts of the revenue therefrom, he is hereby authorized, subject to the consent of the Interstate Commerce Commission after investigation, to reform from time to time such classification, weight limit, rates, zone or zones or conditions, or either, in order to promote the service to the public or to insure the receipt of revenue from such service adequate to pay the cost thereof.

\* \* \* \* \*

Public, No. 336, approved August 24, 1912.



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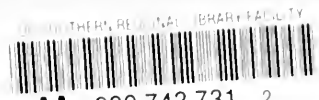












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